

**PREFACE/CLASS OUTLINE
ACQUISITION AND LOGISTICS EXCELLENCE WEEK 2001**

TOPIC: Commercial Acquisition

LENGTH/TYPE: 1 hour/Lecture

SCOPE: FAR Part 12, Acquisition of Commercial Items, is the major acquisition reform product of the Federal Acquisition Streamlining Act (FASA) of 1994 and the Clinger-Cohen Act of 1996. FAR Part 12 establishes clear preferences and streamlined procedures for the purchase of commercial items using business practices common to the commercial sector. Implementation has been inconsistent across DoD. This class presents the latest policy guidance concerning the use of Part 12 for DoD procurements, and highlights the advantages of using commercial item procurement procedures from a requiring activity viewpoint. It also highlights the most recent changes to FAR Part 12, and includes pending FAR and DFARS cases and their potential impact on the acquisition workforce.

LEARNING OBJECTIVES:

1. Given information provided in the lecture regarding FAR Part 12 material, students will be familiar with the latest DoD Guidance concerning the use of FAR Part 12 in Government procurements.
2. Given information provided in the lecture regarding FAR Part 12 material, students will be able to recognize and apply streamlined procedures and techniques to realize resource savings and execute more effective procurements.
3. Given information provided in the lecture regarding FAR Part 12 material, students will be able to identify commercial terms and conditions that can be tailored to achieve efficient and effective business arrangements between Government and Industry.
4. Given information provided in the lecture regarding FAR Part 12 material, students will be familiar with the proposed changes to FAR Part 12 and the impact of those changes on the acquisition workforce.

MATERIALS:

Briefing Charts

Handouts

Definitions – Commercial Item, Nondevelopmental Item (NDI)

Commercial Item Clauses and Provisions

Suggested Broad Classes of Commercial Items



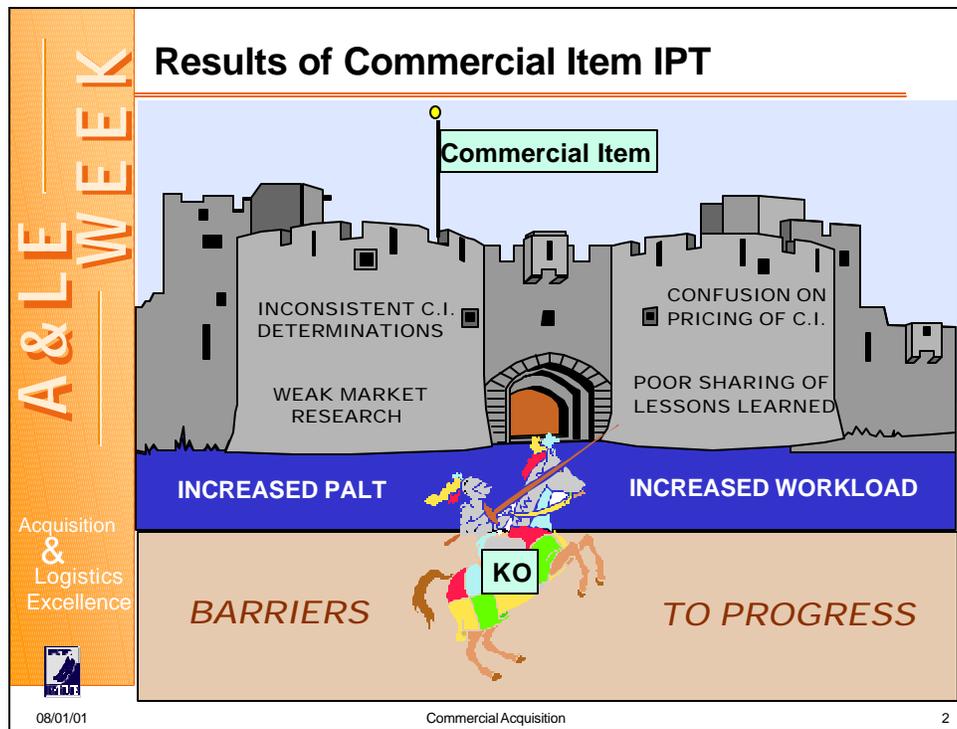
Welcome to Commercial Acquisition!

FAR Part 12 is the major acquisition reform product of the Federal Acquisition Streamlining Act (FASA) of 1994 and the Clinger-Cohen Act of 1996. It establishes a clear preference for Government agencies to purchase commercial items to satisfy customer needs. It also lays out streamlined procedures for purchasing commercial items, the use of which allows contracting organizations to take advantage of significant savings in time, dollar and personnel resources,

Inconsistent implementation of FAR Part 12 across DoD, especially in systems acquisition, is a significant concern. As a result, the Under Secretary of Defense for Acquisition, Technology and Logistics [USD (AT&L)] issued strong guidance in January 2001 to the Military Departments, Defense Contract Management Agency, and Defense Logistics Agency, to overcome obstacles to accessing commercial items and to make more use of the procurement processes found in FAR Part 12.

This block of instruction will present the new DoD guidance. It will revisit the basic policy pertaining to the acquisition of commercial items, and will identify the benefits that organizations can accrue by using Part 12. It will also explode some of the myths that have sprung up that supposedly preclude contracting officers from using Part 12. Finally, it will identify recent and proposed changes to FAR Part 12 and their impact on the acquisition workforce.

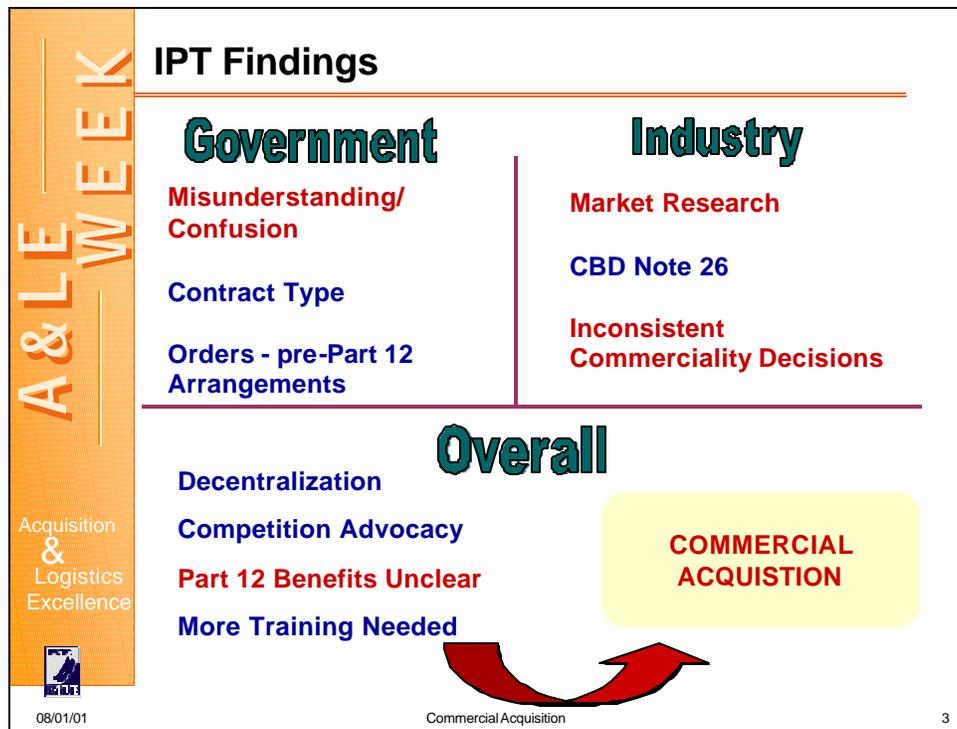
At the end of this instruction, you will clearly understand the benefits of using Part 12 in your operation, and how its non-use can be detrimental to both you and your customers.



Metrics gathered in 1999, concerning the volume of commercial purchases in DoD, were of significant concern to the USD(AT&L). These metrics showed that, in spite of the huge volume of commercial items procured by DoD, and in spite of the relatively small number of new developments and NDI purchases, the number of Part 12 transactions actually decreased from FY97 to FY98. As a result, the Deputy Under Secretary of Defense (Acquisition Reform) [DUSD(AR)] and the Director of Defense Procurement (DDP) were directed to charter an Integrated Process Team (IPT) to review DoD commercial item determinations and to evaluate whether additional guidance, tools, or training were necessary.

The IPT found that some progress had been made, but many obstacles to accessing commercial items remained. These obstacles included inconsistent commercial item determinations, weak market research, confusion concerning pricing of commercial items, and poor sharing of lessons learned.

These obstacles unnecessarily increased workload and acquisition cycle time.



The IPT findings were further broken out by Government and Industry.

The IPT findings from Government:

- Misunderstandings and confusion concerning the application of Part 12
- Contract Type issues
- Orders under arrangements pre-dating Part 12

Findings from Industry:

- Market Research not thoroughly or consistently done
- CBD Note 26 not being used appropriately
- Inconsistent commerciality determinations

Overall findings:

- Decentralization exacerbated the problem
- Competition Advocate without authority or staff
- Perceived benefits of Part 12 unclear or not existent
- More training needed

The last two findings are the main reason for this course.

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Resultant USD(AT&L) Guidance

1. CLARIFY GUIDANCE
2. ESTABLISH GOALS

- ★ *Double the dollar value of Part 12 actions awarded by end of FY05*
 - ★ *Increase the number of contract actions awarded to 50% by end of FY05*
3. IMPLEMENTATION PLANS REQUIRED
4. PILOT PROGRAM
5. COMMERCIAL ITEM HANDBOOK



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In order to overcome the barriers to accessing commercial items, USD(AT&L) took the following actions:

1. Provided clarification on FAR Part 12, in a January 5, 2001 Memo, SUBJECT: Commercial Acquisitions, to yield appropriate consistency in the application of Part 12 across DoD.
2. Established commercial item acquisition goals for the Services and Defense Agencies:
 - Double the dollar value of FAR Part 12 contract actions awarded in 1999 by the end of FY05 (\$12.6B to \$25.2B).**
 - Increase the number of FAR Part 12 contract actions awarded to 50% of all Government contract actions awarded by the end of FY05.** (For purposes of these goals, a contract action is defined as any new contract award and/or new delivery order placed against a contract with a value greater than \$25K.)
3. Requested an implementation Plan from each Service and Defense Agency.
4. Requested that the IPT determine the feasibility of establishing a pilot program to generate a central database to collect market research and Commercial Item Determinations, and to develop tools to assist in ensuring that commercial item determinations are reasonably consistent.
5. Endorsed DUSD(AR) and Service development of a commercial item handbook.

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Why All the Emphasis on Part 12?



**PROVIDE WARFIGHTERS WITH
THE TECHNICAL ADVANTAGE
TO WIN FUTURE CONFLICTS**

**TAKE ADVANTAGE OF
RESOURCE SAVINGS
AND STREAMLINING BENEFITS**



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Why all this emphasis on commercial acquisition?

The USD(AT&L) is convinced that, in order to effectively provide our warfighters with the technological advantage to win future conflicts, requiring activities must uniformly look first to the commercial marketplace before developing new systems; upgrading legacy systems; or procuring spare parts and support services.

Additionally, “going commercial” will allow the Services and Defense Agencies to take advantage of the streamlining benefits and resource savings inherent in the commercial item acquisition process found in FAR Part 12.

Let’s take a quick look at the basic policies found in the FAR that support or direct our efforts to procure commercial items from the marketplace to satisfy our customer’s needs.

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Policy



Commercial Items - Market Research

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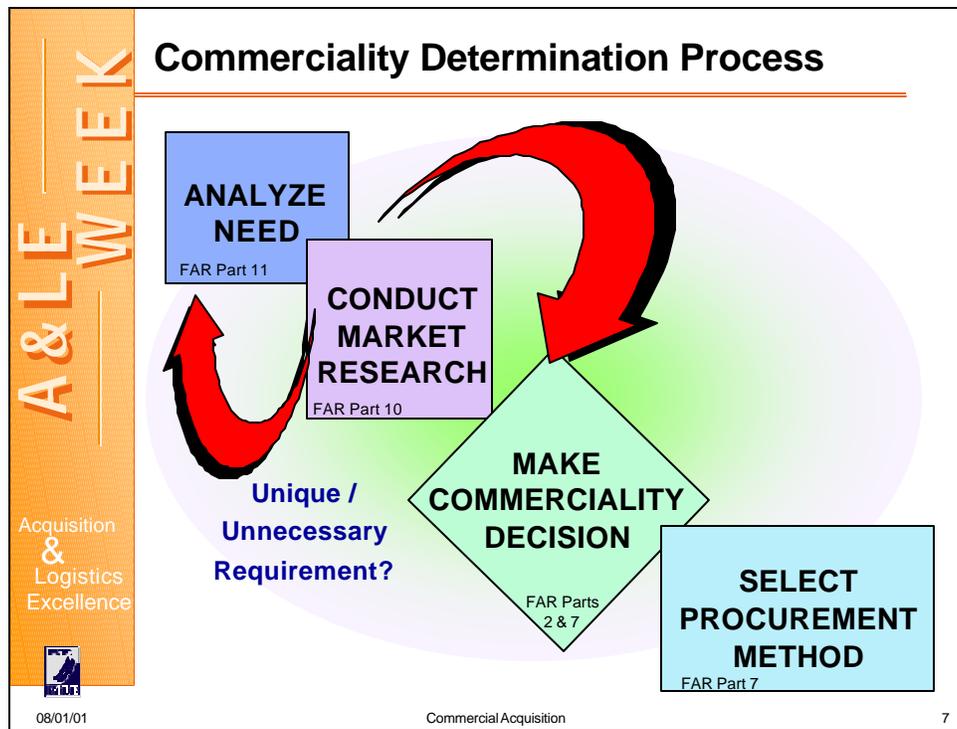
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The basis for the emphasis on commercial item procurement in the Federal Government is the Federal Acquisition Streamlining Act of 1994 (FASA). Section 8104 of that Act established a preference for the acquisition of commercial items to satisfy agency needs, and required that market research be conducted prior to developing any requirements document - be it a user needs statement, a specification or a statement of work. It also required that agencies state their needs in performance terms, to facilitate the procurement of commercial items to satisfy those needs.

This statutory language has been incorporated into FAR Parts 2, 10, 11 and 12, and into the DoD 5000 series.

This language also established a business procedure that must be applied to each identified need prior to proceeding with the procurement. This process is called the commerciality determination.



The commerciality determination process should take place prior to every acquisition. The process has 4 steps:

1. Analyze the need - identify it's characteristics in terms of form, fit, function and interfaces.
2. Perform market research - identify items of a similar nature that already exist in the market place in terms of characteristics, suppliers, business practices, and laws and trends.
3. Make the commerciality determination - compare the need with the market research, apply the definitions of a commercial item. This step includes a requirement to revisit the need if no commercial item exists in the market place.
4. Determine procurement method - if commercial, use Part 12 in conjunction with Part 13, 14 or 15. If not, use other appropriate FAR part.

Who makes the commerciality determination? Ultimately, it is the result of efforts by the customer, functional teams, and contracting personnel.

Perform Requirements Analysis

MISSION ENVIRONMENT

PERFORMANCE

QUANTITY

SCHEDULE

COST

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Let's look at each step in a bit more detail. Analyzing the need is also known as requirements analysis.

This is the process used to identify what key characteristics a yet-to-be-identified item must possess to meet the user's need.

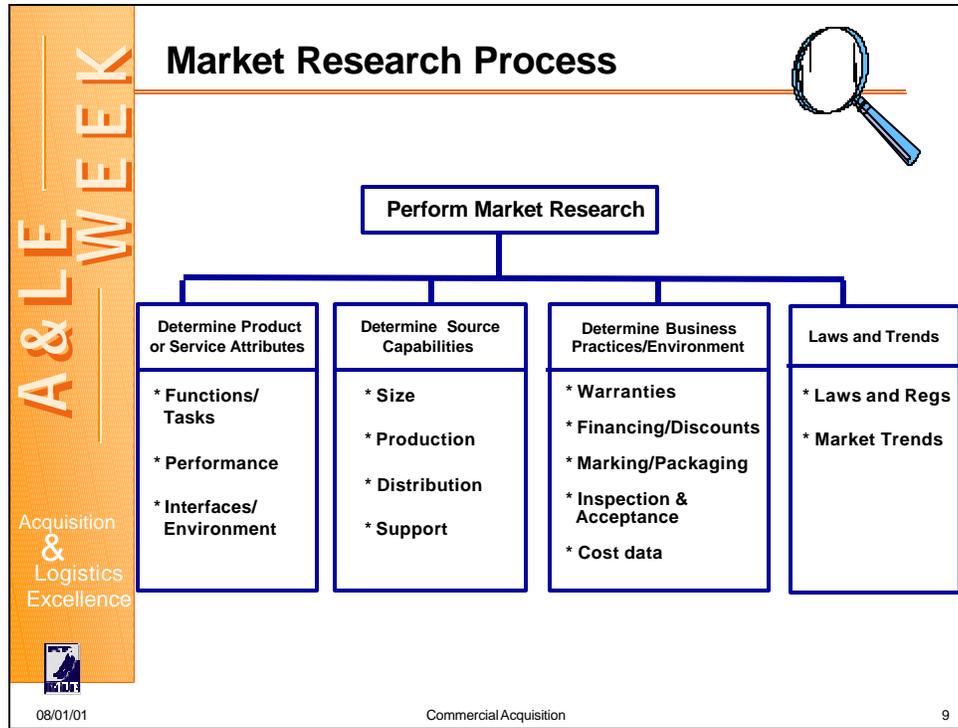
The statement of need must be distilled down to a slate of critical characteristics - performance, mission environment, schedule, quantity and cost - that are the minimum required characteristics an item must possess to meet the customer's requirement.

We avoid unnecessary or unique features that would skew our analysis and drive us into one particular item.

We find this information in the requirements document. For example:

Generator - Weigh no more than 100 lbs; operate in temperature range of 120 degrees F to -10 degrees F; capable of self-sustained operations for not less than 30 hours; MTBEFF greater than 200 hours; quantity 100, must be delivered in 3QFY00.

Who does this? The customer!



This diagram represents the market research process.

It identifies the key information that must be gleaned from your market research effort.

We will search the marketplace for product characteristics (attributes), source capabilities, business practices, and laws and trends that apply to the item in which we are interested.

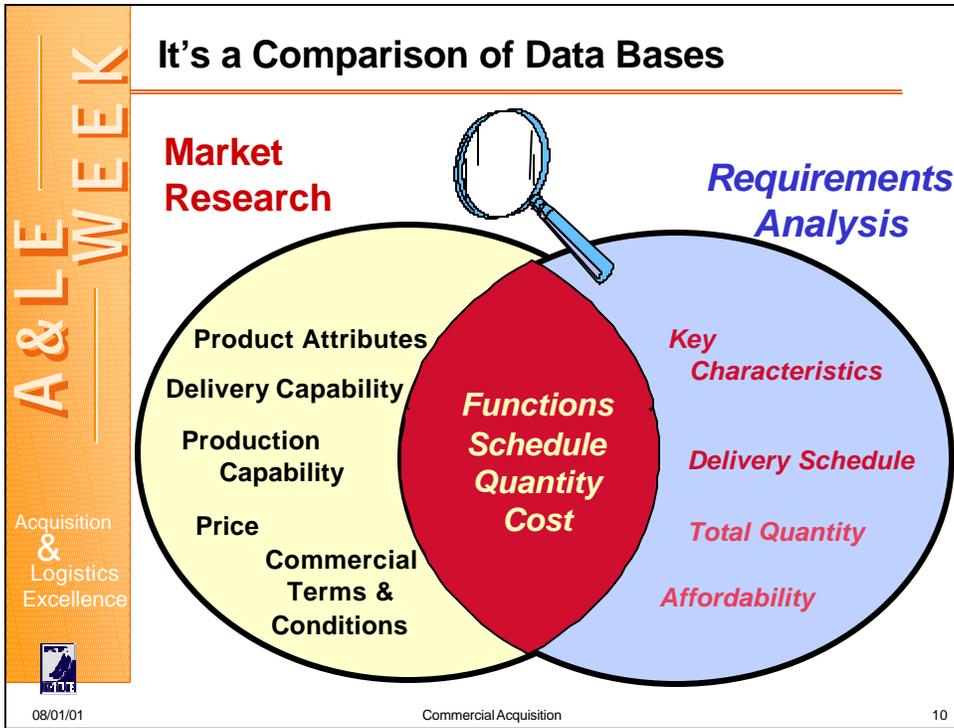
For our generator example, where would we find:

- item characteristics
- source capabilities
- business practices
- laws and trends?

(INSTRUCTOR NOTE: Answers are;

Product literature, the internet, yellow pages, office files, other Government agencies (Federal, State, local), Dun & Bradstreet, Thomas Register, etc.)

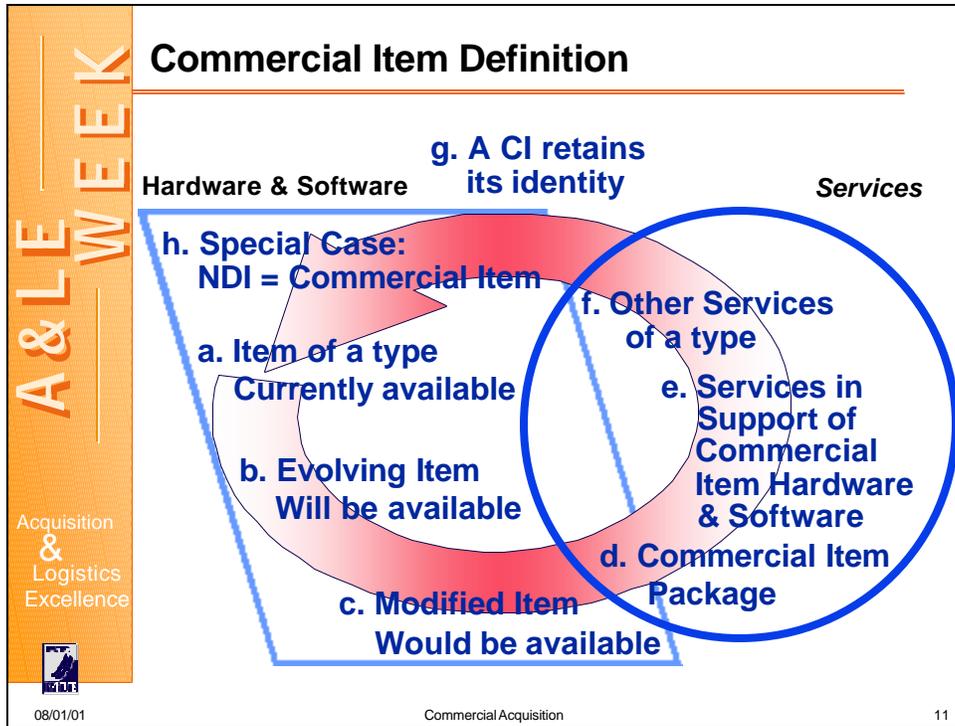
Who does this? The customer, the functional members of an IPT, the contracting officer.



We now compare our market research and requirements analysis. Market research tells us what the commercial marketplace can provide and how the commercial marketplace conducts business. Requirements analysis tells us what an yet to be identified item must do to meet a need and when the user wants the need met. The greater the overlap between our information from market research and our information from requirements analysis, the stronger is the case for a commercial item. If there is no overlap, or only a slight overlap, we must revisit the need with the user (modify the need?, restate the requirement?, challenge unique requirements?). We are to challenge requirements that exclude commercial items. If a commercial item procurement is not possible, market research provides data on the possibility of a nondevelopmental item procurement. Of course, as a last resort we have a New Development procurement option. But even here we expect market research to provide us with the capabilities of the contractor(s) to integrate commercial items at the subsystem and component levels of development. We must remember that whatever procurement path is chosen, it must satisfy the agency's need.

The overlap can be enhanced by refraining from the use of restrictive (detailed) provisions, and by inviting industry to comment on the requirements before any requirements document is finalized.

Who does this? The customer (whoever generates the requirements document). If the requirements analysis and the market research were done thoroughly, the commerciality determination should be made before the requirements document hits the contracting shop. Sometimes, however, the decision is made by the contracting officer.



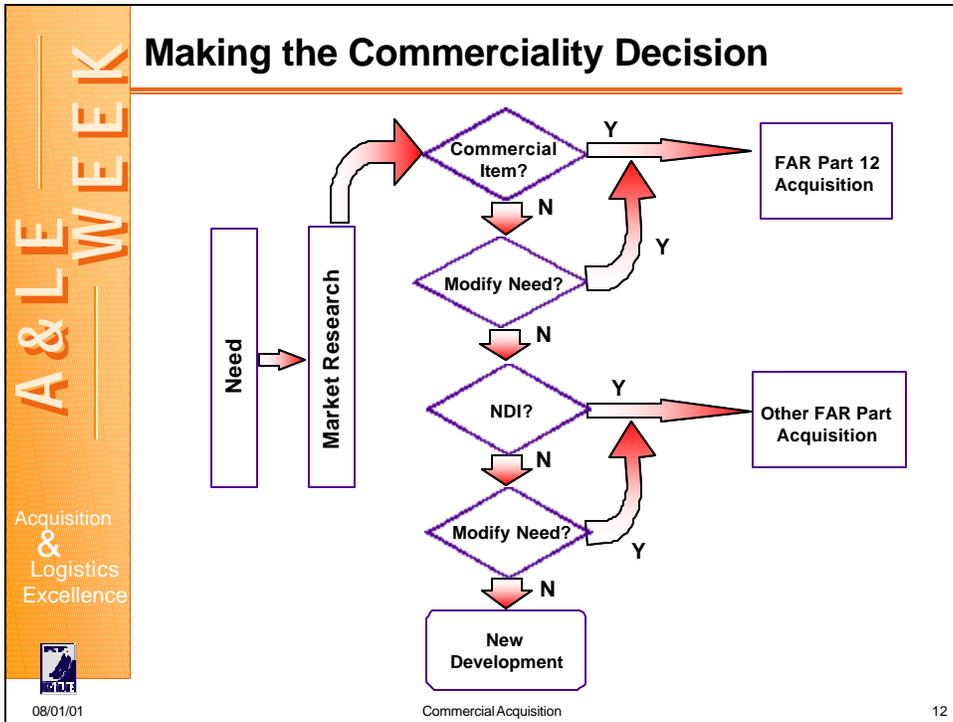
In order to determine if there are commercial items in the market place that will meet the customer's need, we must understand the definition of a commercial item. Look at the handout just behind the last slide in the presentation. This 8 part definition is lifted straight out of FAR Part 2.

Note how broad this definition is. This is a means of empowering the contracting team to access the commercial marketplace for products & services to meet user needs.

Parts a, b, & c pertain to commercial hardware & software performance attributes, & scheduled availability. Part h is a special case when NDI hardware or software used by state & local governments can be procured by federal agencies as commercial items to meet user needs.

Parts d, e, & f pertain to services. In part d, any service that is part of a commercial package (products and services sold together) is a commercial service. In part e, services procured for support of commercial hardware & software mentioned in the first 3 parts are considered commercial services. And in part f, we find the definition that most often fits into the performance based services contract arena.

Part g pertains to identity. Any commercial item hardware, software or service retains its identify as a commercial item regardless of changes in location. The only way to change the identity of a commercial item is to modify the hardware or software to the extent that the functions & interfaces significantly change, i.e. - a major mod. Or, to alter the commercial item service beyond the boundaries in parts e or f of the definition. The handout at the back of this lesson reflects the current definition of Commercial Item.



This diagram depicts the entire process.

1. Compare need (requirements analysis database) to market research (market capabilities database)
2. Does a commercial item meet the need? If the answer is yes then a FAR Part 12 acquisition is required.
3. If not, can the need be modified so that a commercial item can meet the need? If the answer is yes, then a FAR Part 12 acquisition is required.
4. If not, can a non-developmental item meet the need? If the answer is yes, then another FAR Part Acquisition method should be used.
5. If not, can the need be modified so that a non-developmental item can meet the need? If the answer is yes, then another FAR Part Acquisition method should be used.
6. If not, then a new development should be started using another FAR Part acquisition method.

Sounds pretty straight-forward! But are there circumstances where the item to be purchased is commercial, but some FAR Part other than 12 is used to make the purchase?

Applicability of Part 12

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Applies to acquisition of supplies and services meeting the definition of commercial item

Does not apply to micropurchases, SF44 imprest fund, IMPAC card

Part 12

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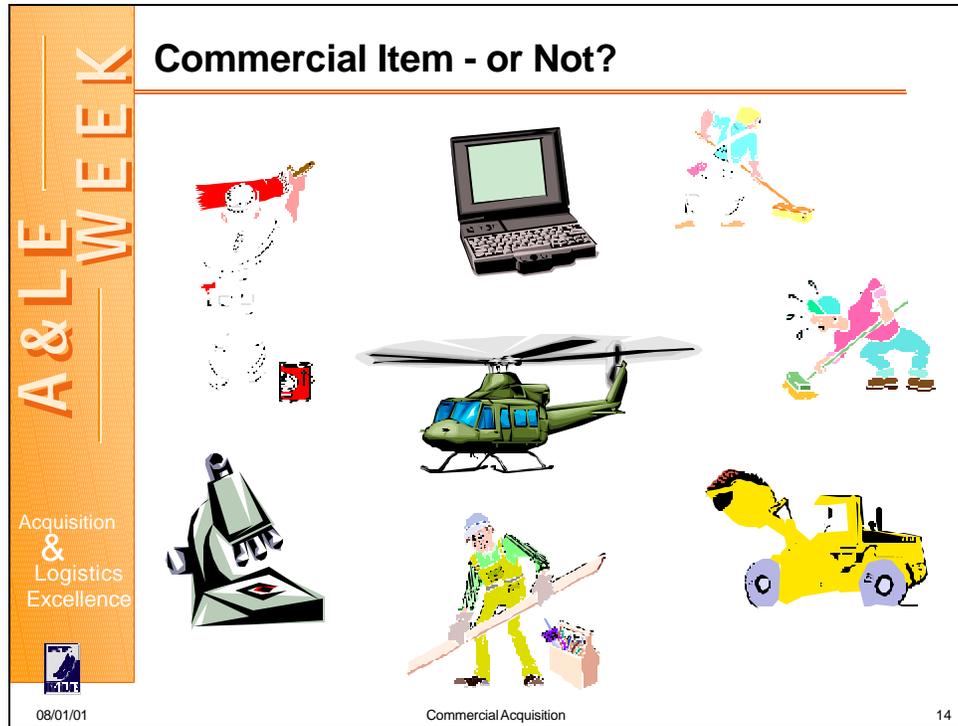
Part 12 is applicable to the acquisition of supplies and services meeting the definition of a commercial item in Part 2.

This part does not apply to acquisition of commercial items below the micro-purchase threshold, using SF44, imprest fund, and government-wide commercial purchase card.

Use of the new policies, provisions and clauses is mandatory for solicitations issued after December 1, 1995.

(12.101) (12.102)

Again -pretty straight-forward. Let's take a quick test.



Here are some examples of supplies and services; a laptop computer (representing IT), janitorial services, construction equipment, minor construction services, medical equipment, painting services, and in the middle - a helicopter.

Which items are commercial, and should be procured using FAR Part 12?

Which are non-commercial, and should be procured using some other Part of the FAR?

(INSTRUCTOR NOTE: This should generate a lively discussion.)

All of the items could be classified as commercial, resulting in contracts written under Part 12.

And yet, some activities have identified them as other than commercial, and procured them under some other Part of the FAR. Interesting - in the same command, the item has been called commercial in one activity and non-commercial in another.

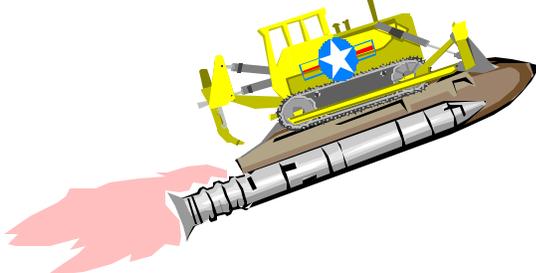
Who's right?

First, let's see if there are valid circumstances where commercial items are procured using other than FAR Part 12.

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Circumstances Precluding Use of Part 12

- ◆ **Contract type other than fixed price, fixed price with EPA, IDIQ (prices based on fixed price)**
- ◆ **Orders under arrangements pre-dating Part 12**
- ◆ **Purchases from Federal Prison Industries**
- ◆ **Unique Government requirement (Major modification)**



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There are circumstances that preclude use of Part 12, even if a contracting officer knows unequivocally that the item is commercial:

1. Circumstances of the buy require use of a type of contract other than those authorized in Part 12; e.g. cost type contracts, FPAF, Time and Materials. For example - risk may drive you into cost-type contracts. (However, one way to avoid risk is to structure requirements in performance terms.)
2. Ordering from an arrangement that pre-dates the use of Part 12. But once that instrument is completed, the next buy should be a Part 12 buy.
3. Part 12 is not applicable to acquisitions from FPI, or UNICOR, which is a wholly owned Government corporation. Purchases of these items are conducted in accordance with FAR Subpart 8.6.
4. Occasionally, valid unique military requirements cause a commercial item to undergo a major modification to meet the need. This is, in effect, a new development, and precludes the use of Part 12 by definition. Care must be taken here to ensure that the requirement is truly needed - and not just "gold-plating".

These are valid reasons for not using Part 12. Let's look at some that are not valid - but are, unfortunately, used as excuses to avoid Part 12.

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Myths

- ✓ **Simplified Acquisition Procedures**
- ✓ **Javitts-Wagner O'Day (JWOD) purchase**
- ✓ **Lack of market price for exact item**
- ✓ **Existence of hourly rate**
- ✓ **Service Contract Act applies**
- ✓ **"Once military, always military!"**



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These are examples of some of the invalid circumstances for not using Part 12.
 SAP - Not so! FAR Subpart 13.5 allows contracting officers to use a combination of Simplified Acquisition Procedures and Part 12 to purchase commercial items above the SAT but not exceeding \$5 million.

JWOD - Not entirely! JWOD acquisitions are conducted in accordance with FAR Subpart 8.7, however contracting officers may use Part 12 for JWOD acquisitions if it is determined to be cost-effective.

No market price -Not so! It is not necessary to find an market price for the exact item. It is enough to be able to determine a market price for a similar item.

Hourly rates - Maybe! Part 6 of the definition of a commercial item precludes services sold based on hourly rates. However, if the requirement is stated in terms of tasks to be priced for the period of the contract, that solves the hourly rate problem.

SCA - Not so! This used to be a frequent reason for not using Part 12; however it is totally false. As a matter of fact, 52.212-5 lists The Service Contract Act clause 52.222-41 one can be incorporated into the Part 12 solicitation and contract by reference.

Frequently, industry will build military-unique items for a Service, and then turn that item into a commercial product. There is nothing to preclude a contracting officer buying the unique item the first go-around, and the commercial offshoot the next. It's probably a smart move - it will be less expensive!

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The Other Impediment - The Workforce

Part 12 is optional

Sealed Bidding has worked for 30 years- no need to change now!

Our stuff is unique

I don't have time to learn

The customer can refuse a commercial item

TRANSLATION - "I DON'T WANT TO!"

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There is another major impediment to the acceptance of using Part 12; the workforce itself.

While a good portion of the workforce is, or can be, convinced to embrace acquisition reform/empowerment, just as many don't like change - and refuse to do so.

They will embrace the myths that we spoke to on the last slide. If those myths are dispersed, they will generate other reasons:

I don't have time to learn the new procedures.

Those procedures are optional, so I'll stick with Part 15.

Sealed bidding was good enough for me these last 30 years, so there's no need to change now.

The stuff we buy is unique.

This one is tough sometimes. Some military folks have an aversion to purchasing commercial items - "Not good enough!"

It takes some convincing, but more and more, commercial items are proving to be quality items that can meet most needs.

These people must be convinced of the benefits of using Part 12. In today's environment of draw-downs and scarce resources, going to Part 12 may be the only way to be able to get the job done effectively and on-time.

Let's investigate these benefits.

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Benefits - Acquisition of Commercial Items

- Streamlined Process
- Increased Competition
- Reduced Paperwork

Increased Industry Participation
Empowerment!

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There are significant benefits that the authors of FASA, and our leadership, expect to accrue to our acquisition community through the use of Part 12 procedures.

Use of the streamlined procedures saves considerable time and money for both the Government and industry: The contracting process is simplified and shortened, allowing Government agencies to reap resource savings and to do more with less.

The Government gains access to a wider portion of the commercial marketplace, increasing competition and accessing more items.

Many burdensome, government-unique provisions have been eliminated, reducing administrative costs and encouraging increased industry participation in the government contracting process.

These changes also empower contracting officers with a great deal of flexibility, and encourage them to make decisions based on good business sense and best value.

In order to take advantage of these benefits, the contracting workforce needs to acquire and be comfortable with some new skills.

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New Skill Required



- ✓ **Determining Customary Practices**
- ✓ **Tailoring Terms and Conditions**
- ✓ **Determining Response Times**
- ✓ **Evaluating Different Offers**
- Evaluating Alternative Terms and Conditions**
- Dealing with Different People**
- Acting Empowered**

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There are some new skills that contracting professionals must learn in order to take advantage of the Part 12 procedures.

Examples of the new skills required by government contracting personnel:

Determining what are customary commercial practices.

Tailoring terms and conditions to a particular commercial buy.

Determining what is a reasonable response time.

Evaluating different commercial offers.

Evaluating alternative terms and conditions proposed by offerors.

Learning to deal with a "different" set of marketing and sales people, that is, not the Military Sales Group.

Leveraging the FAR rather than being limited by the FAR.

Let's take a look at the streamlining tools in Part 12 available to the contracting community, and the benefits that can be achieved by using these tools.

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Categories of Benefits



Streamlines the process



Saves time



Saves dollars/people



Empowers the CO



Encourages competition



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As we explore the benefits of using Part 12, you'll see one or more of these logos on the slides.

The lightning bolt indicates something that streamlines the process.

The clock indicates a time saver.

The dollar sign indicates a resource (money/personnel) saver.

Uncle Sam indicates something that empowers the contracting officer to make sensible choices, to be flexible.

The racers indicate something that encourages competition.

Note the warning /caution sign. You will also see this icon occasionally. It indicates that care must be taken if certain circumstances are present. It may also indicate the existence of a myth - or some practice that must be avoided.

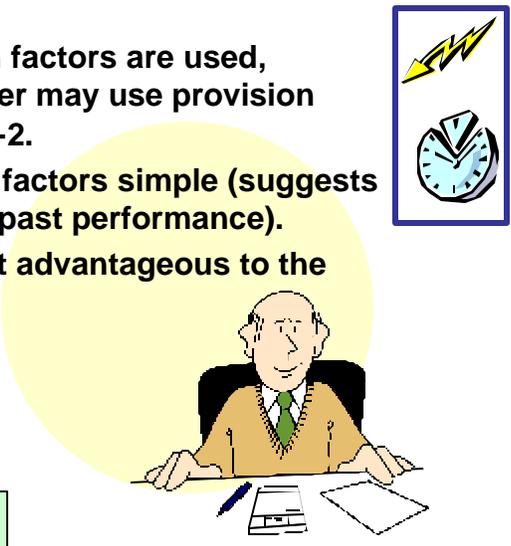
Now let's look at our Part 12 procedures.

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Streamlined Procedure - Evaluation

- **When evaluation factors are used, contracting officer may use provision similar to 52.212-2.**
- **Keep evaluation factors simple (suggests technical, price, past performance).**
- **Select offer most advantageous to the government**

12.203,12.602



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Subpart 12.6 contains coverage on the streamlined procedures for contracting for commercial items.

They are intended to simplify and speed up the procurement process.

First, we find the procedure for evaluation of offers. The language here consists of 3 short paragraphs. Quite the contrast to the pages of language dealing with the same subject in Part 15.

This informal procedure tells us when evaluation factors are used, the contracting officer may use a provision similar to 52.212-2 Evaluation – Commercial Items. The provision should be tailored to describe the evaluation factors and give their relative importance.

It then suggests that evaluation criteria be kept to a minimum - such as technical, price and past performance. Keep the factors simple. Subfactors are not necessary if the solicitation adequately describes the item's use.

Offers shall be evaluated in accordance with criteria contained in the solicitation. The technical evaluation would normally include examination of product literature, product samples and warranty provisions.

Finally, the contracting officer should select the offer that is most advantageous to the Government, based on the criteria listed in the solicitation.

We may also borrow procedures from Parts 13, 14 or 15 to include in the evaluation process, if they are appropriate and enhance the process.

(12.203,12.602)

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Streamlined Procedure - Solicitation

- **Combines CBD synopsis and solicitation into single document**
 - limited to 12,000 textual characters
 - for simple solicitations only
- **Response time - 15 days**

12.603

Federal Agencies have until Oct 1 to complete their transition to FedBizOpps, the government wide point of entry for contract notice.

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The second streamlined procedure is the combined CBD/Synopsis.

To reduce solicitation time, the contracting officer may use a streamlined procedure which combines the required CBD synopsis and the issuance of the solicitation into one document. Limitations are:

FAR 5.207 limits submission to the CBD to 12000 textual characters (about 3 1/2 single spaced pages).

It is only appropriate where the solicitation is relatively simple.

In this case, the SF1449 Solicitation/Contract/Order for Commercial Items, is not used.

Contracting officers should establish a reasonable response time.

Post copies of the CBD/synopsis as usual. Amendments to the solicitation shall be published in the same manner.

(By the way, if the requirement is for other than a commercial item or service, the synopsis must inform the offerors that the Government does NOT intend to use Part 12 for the solicitation. Numbered note 26 should be used. This gives industry an additional opportunity to recommend commercial alternatives that might not otherwise be known to the Government.)

This really streamlines the process, saves time, and reduces documentation.

There has been a tremendous increase in the use of the combined CBD/Synopsis by DoD in the last couple of years.

(12.603)

Federal Agencies have until Oct 1 to complete their transition to FedBizOpps, the government wide point of entry for contract notice.

Contract Type

Firm-fixed price or fixed price with Economic Price Adjustment

Indefinite Delivery based on Firm-fixed price or Fixed-price with Economic Price Adjustment

12.207

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Agencies shall use firm-fixed price contracts or fixed price contracts with economic price adjustment for the acquisition of commercial items.

Indefinite-delivery contracts may be used where prices are established based on a firm-fixed price or fixed price with economic price adjustment.

Use of any other contract type is prohibited.

This keeps the process simple and keeps administrative costs to a minimum.

It also puts the majority of price, schedule and performance risk squarely on the contractor.

There is a proposed rule, however, that would allow the used of award fee incentives and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost. (FAR Case 2000-013)

This would provide the contracting officer much more flexibility.
(12.207)

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Contractor Quality Assurance

- Rely on contractor's existing quality system (unless customary market practices permit in-process inspection)

12.208

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Part 12 tells us that contracts for commercial items shall rely on contractor's existing quality systems as a substitute for government inspection, testing, and acceptance, unless customary market practices permit in-process inspection.

Any resultant in-process inspection shall be conducted consistent with commercial practice.

This is also a cost saver. Government inspection, testing, and acceptance is resource-intensive, expensive, and can be time-consuming.

It also encourages competition - this is what commercial buyers do regularly in the marketplace. They are used to the process. By imposing additional Government inspection and acceptance procedures, you can scare good contractors off.

(12.208) (46.102) and (46.202-1)

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Pricing of Commercial Items

- Acquisitions for commercial items are excepted from the requirement to obtain cost or pricing data
- Policies and procedures for establishing price reasonableness - FAR Subpart 15.4
- Pricing modifications

12.209





Commercial Acquisition

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Acquisitions for commercial items are excepted from the requirement to obtain cost or pricing data. The basis for this is the assumption that commercial item prices will either be below the TINA threshold (\$550,000) or will be set by adequate competition.

The policies and procedures for establishing price reasonableness can be found in FAR Subpart 15.4.

When an existing contract for a commercial item was priced under one of the exceptions, no cost or pricing data may be obtained for a modification unless the modification would change the contract from one for a commercial item to one for other than a commercial item.

Ideally, when buying a commercial item, no additional pricing data should be required to determine price reasonableness.

Warning! The DoD report referenced earlier found that some contracting folks are assuming that there is a dependent relationship between a commercial item determination and price reasonableness. Not so! Just because a price is stated in a catalog doesn't automatically make it reasonable. The contracting officer must still establish price reasonableness through comparison or some other technique. And, the CO can ask for information other than cost or pricing data to help determine reasonableness. The CO should also obtain information on standard discounts, warranties, or different levels of performance, and negotiate accordingly.

Not having to go through the formal cost or pricing data process does, however, save considerable time and effort. And, the contractors appreciate not having to submit same.

(12.209)

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Computer Software

- Acquired under licenses customarily provided to general public
- Contractors not required to
 - furnish information not customarily provided to the public
 - relinquish rights (e.g. reproduction) unless mutually agreed to

12.212

Commercial Acquisition

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A similar case is made for the acquisition of commercial software. Commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public.

Offerors are not required to

Furnish technical information related to commercial computer software or computer software documentation not customarily provided to the public.

Relinquish to the Government rights to use, modify, reproduce, release, perform, display or disclose commercial software or documentation except as mutually agreed to.

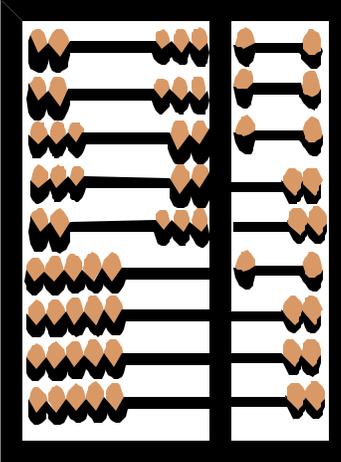
The Government shall have only those rights specified in the license contained in any addendum to the contract.

Again, this is a money-saver. Asking a contractor for additional information or to relinquish certain rights can get expensive, and may scare that contractor off.

(12.212)

A&L WEEK

Other Customary Practices



- If other customary practices are appropriate, they should be considered for inclusion

12.213





08/01/01
Commercial Acquisition
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In the commercial marketplace, it is customary for both the buyer and the seller to propose terms and conditions for a transaction, written from their respective perspectives.

Terms and conditions in Part 12 are written from the Government's perspective as a buyer in the commercial marketplace. These are generally appropriate for most buys. (As we will see shortly, however, many of the terms and conditions used in a Part 12 buy are based on the Uniform Commercial Code, and resemble terms and conditions used regularly in the marketplace.)

If other practices are appropriate to a particular buy, they should be considered for use, if appropriate in concluding a business arrangement and not otherwise precluded by law. This provides the Government with the appropriate flexibility needed to mirror the marketplace.

Where are these "other practices" found"? You see them in alternative terms and conditions submitted by offerors. You also discover them while doing market research.

Caution! Some commercial practices may be inappropriate for use in Government contracting. Let's take a look at some "other" practices.

(12.213)

A&L WEEK

Common Commercial Practices

- Other practices (in Offeror's contract). Be cautious. May be acceptable, but investigate:
 - > Merger clause
 - > Non-disclosure provisions
 - > Notice requirements
 - > Right to substitute goods







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Commercial Acquisition
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The practices above and on next slide, are not necessarily all unacceptable, but should merit further careful review. These practices often find themselves into a contractor's proposal.

Merger clause - purpose is to negate verbal statements made by seller's personnel that could be construed as creating express warranty. If you're relying at all upon verbal assurances or statements, and you see this clause, either delete clause or require verbal assurances be reduced to writing and made part of contract. Generally worded: "Any oral statements by seller do not constitute warranty, are not part of sale and should not be relied upon...." etc.

Non-disclosure provisions. Common practice, especially in high tech industry, is to only protect information disclosed in writing/stamped as confidential. Review post-award environment to see if this limitation would adequately protect sensitive data.

Notice. Many sales contracts providing warranties (or other buyer rights) will also require warranty claims be made within x days after noticing defect, or within x days after delivery/acceptance of product. Although a good idea to have timeframes so parties won't be kept guessing, make sure they are realistic. Lengthening timeframe may affect price.

Right to Substitute Goods. Some sellers want to reserve right to substitute goods for various reasons. **EXAMPLE.** Companies may agree to substitute items of equal price but better performance. Give it careful consideration (any special limits needed?) before accepting it.

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Common Commercial Practices/Clauses

- **Waivers/waiver clause, Course of Performance**
- **Assignment clause**
- **Seller insisting on buyer inspection**
- **Exclusive remedies clause**




Commercial Acquisition

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Waivers/waivers clause. Insist on strict performance. Not doing so may result in problems. If parties deviate from contract language, Course of Performance, i.e., conduct under contract, may potentially result in mod, or waiver of rights to insist on strict compliance. Post-award admin must be crisp. While Statute of Frauds may require certain mods to be in writing, or parties may state up front all MODS must be in writing, court can rule that although subsequent actions have not modified contract, effect of certain provisions has been waived. EXAMPLE: delivering consistently late. Waiver clause prevents this from happening and is good idea.

Exclusive remedies clause: Common in sales contracts. Establishes exclusive remedy in event of breach by seller, or a certain exclusive remedy in event of particular breach. Parties are generally free to fashion their own remedies and may establish them as exclusive ones. This is also supported in UCC (2-719), provided remedy is a minimum adequate remedy. Often found in warranty situations. Courts tend to narrowly construe these, i.e., it must be clear remedy is understood to be exclusive. Practice in Gov't contract, at least in non-compliance areas, may be ok but review first. Also, retain remedies for Gov't if company violates law/regs.

Assignment clauses commonly found. Often states assignment can only be made with prior written consent of parties, unless assignment arises because of sale of company or most of its assets. Here a Gov't buyer needs to be very careful since proposed new contractor, i.e., assignee may not be eligible: non-responsible, foreign, etc. Best to handle any proposed assignment on case-by-case basis, using the guidance at 42.1200, rather than agree upfront.

Seller insisting on buyer inspection. Often sellers want speedy determination whether deliverable is acceptable so they sometimes require buyer inspect goods or services. In context of UCC, when seller insists on buyer inspection and inspection has not been conducted, effect is there are no implied warranties on anything buyer should have found. Failure to inspect does not affect express warranties and may not affect your other rights under the Government inspection paragraph, but be careful.

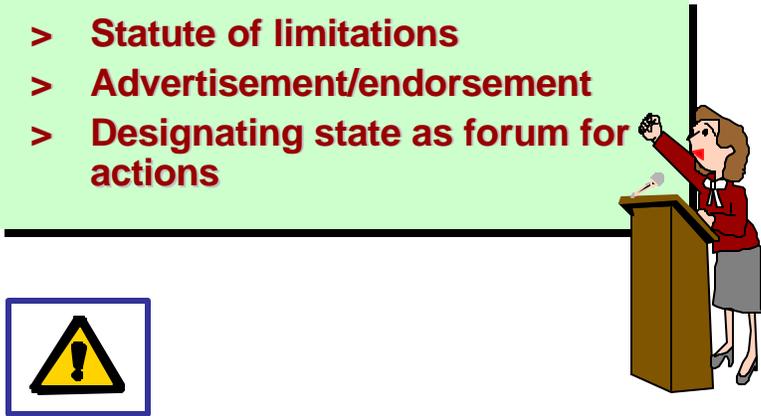
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Common Commercial Practices, Cont.

- **More Common Practices. Probably not acceptable:**
 - > **Statute of limitations**
 - > **Advertisement/endorsement**
 - > **Designating state as forum for actions**



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Statute of limitations. Be wary of any provisions that seek to limit time period in which either party can bring action against the other. This is extremely common in sales contracts. Sellers like to shorten time period as much as possible. UCC says an action for breach must be commenced within 4 years after breach, but that parties can shorten it to not less than 1 year. Remove any statute of limitations and let federal law, as it relates to procurements, govern. (2-725)

Advertisement/Endorsements. Some companies have a practice of trying to get their customers to serve as “automatic” endorsers of products by inserting clauses to that effect in their contracts. Be wary of this as Government does not normally act as a public endorser.

State Forums - Most sales contracts designate particular state in which suits must be filed. Generally, this is where company has substantial presence or main office. Delete this as being inconsistent with federal Government law which would be adjudicated in federal forums.

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Solicitation Provisions and Contract Clauses

- **Agencies shall include only those clauses**
 - required by law
 - determined to be consistent with commercial practice in Part 12
- **Agencies may include other FAR provisions when use is consistent with Part 12**
- **Agencies may supplement these provisions to reflect agency unique statutes**





12.301

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Commercial Acquisition

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FAR Subpart 12.3 establishes solicitation provisions and contract clauses for the acquisition of commercial items. They are limited to those...

Required to implement provisions of law or executive order.

Determined to be consistent with commercial practice.

There are no “standard” practices across industry found in Part 12. There are, however, three solicitation provisions and two contract clauses specifically tailored to commercial items. They will be discussed shortly.

The contracting officer may include other FAR provisions by addendum when their use is consistent with the limitations of Part 12, such as...

Use of indefinite-quantity contract.

Use of options.

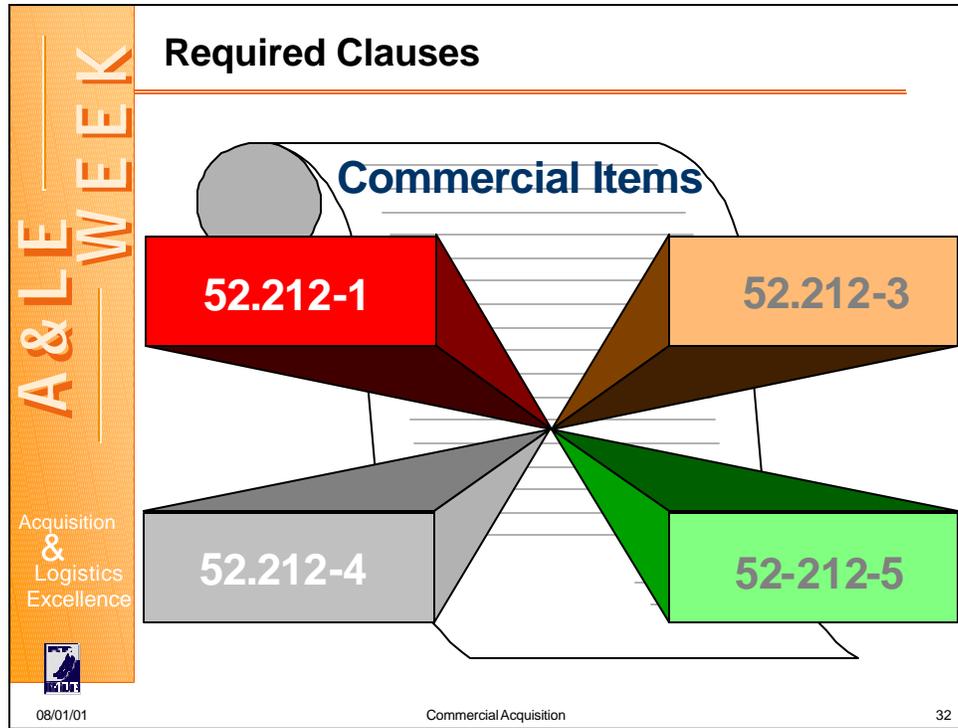
Use of recovered material.

Agencies may supplement these provisions to reflect agency-unique statutes.

These provisions and clauses are highly streamlined, cut the paperwork burden tremendously, and give the contracting officer a great deal of flexibility.

They also make a Part 12 procurement look more like a commercial procurement - it contains fewer onerous unique requirements, thereby encouraging more industry participation - more competition.

(12.301)



These clauses are the only ones required for use in solicitations and contracts for commercial items.

(12.301)

INSTRUCTOR NOTE:

Refer students to handout containing 52.212-1 through 52.212-5, let them follow along as you discuss the provisions.

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Tailoring of Clauses



- May tailor 52.212-1 and -4 to adapt to market conditions
- Can not tailor 52.212-4, statutory provisions
- May not tailor inconsistent with customary practices - waivable by agency if practice inconsistent with needs of the government
- Tailoring accomplished by addenda






12.302

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Commercial Acquisition
33

The provisions and clauses established in Part 12 are intended to address, to the maximum extent practicable, customary commercial market practices. However, because of a broad range and variations in customary practices, contracting officers may, after conducting appropriate research, tailor 52.212-1 and -4 to adapt to market conditions.

This gives the contracting officer tremendous flexibility! It makes Government solicitations more attractive to a larger portion of the marketplace.

Warning! There are certain statutory provisions of 52.212-4 that cannot be tailored:

- Assignments.
 - Payment.
 - Other compliances.
 - Disputes.
 - Invoice.
 - Compliance with laws unique to Government contracts.
- And, provisions may not be tailored in a manner inconsistent with customary practices unless a waiver is approved IAW agency procedures.

Tailoring is accomplished by adding an addendum to the solicitation and contract. Let's look at each clause.

12.302

**52.212-1, Instructions to Offerors-
Commercial Items**

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- **Single streamlined set of instructions to offerors**
- **Incorporated by reference**
- **Tailable**



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Instructions to Offerors - Commercial Items. **(52.212-1)**

(Please refer to the Commercial Clauses Handout for coverage of this and subsequent clauses.)

This provision contains a single streamlined set of instructions unique to government procurement of commercial items. It is based on existing FAR language, but has been significantly simplified and tailored for commercial item acquisitions. For example, it deals with things such as submission of offers, multiple offers and late offers.

It is incorporated into the solicitation by reference and can be tailored further, if necessary.

(12.301) (52.212-1)

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52.212-4, Contract Terms and Conditions - Commercial Items

- Customary terms and conditions
- Incorporated by reference
- Tailorable (except statutory provisions)





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Contract Terms and Conditions - Commercial Items. (52.212-4)

This clause contains terms and conditions that are consistent with customary commercial practice and which generally address the “core” areas covered by commercial contracts. Unique language addresses:

- Acceptance.
- Changes.
- Excusable delay.
- Payment terms & conditions.
- Termination for convenience.
- Warranty.
- Compliance with laws.
- Claims.

While it is impossible to be “universally standard”, this clause comes close. It is incorporated by reference and it allows the contracting officer to tailor elements of it to the particular item and market.

Note: No unilateral changes are allowed (unless tailored for same due to commercial practice).

Caution: Remember, you cannot tailor the statutory paragraphs of this clause.

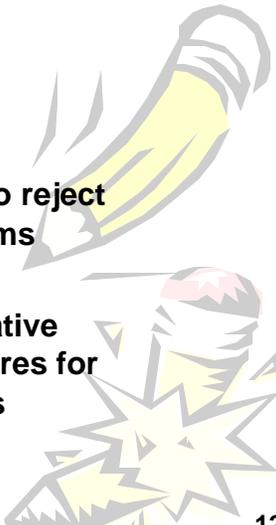
(12.301) (52.212-4)

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Acceptance - Tailor to Situation

- Rely on contractor assurances
- Maintain the right to reject nonconforming items
- May include alternative inspection procedures for critical applications




12.402

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Subpart 12.4 (Unique Requirements) contains guidance regarding tailoring of several of the paragraphs in 52.212-4, when those paragraphs do not reflect customary market practices, and guidance on the administration of contracts for commercial items where terms and conditions in the clause differ considerably from guidance found elsewhere in the FAR.

The acceptance paragraph in 52.212-4 is based on the assumption that we will rely on contractor assurances that his commercial item conforms to our requirement. This saves the Government time and money.

Even though not expressly stated in the clause, we still have the right to refuse acceptance of nonconforming items.

Other acceptance procedures may be more appropriate for the acquisition of complex items, or items used in critical applications. If so, the alternative procedures shall be included in an addendum.

Acquisition of commercial items on an “as is” basis may require acceptance procedures different from those in the clause.

The bottom line is that the contracting officer has maximum flexibility to tailor this paragraph to match peculiar circumstances of the buy.

Let’s compare 52.212-4(a) with the traditional FAR clause found at 52.246-2.
(12.402) (52.212-4)

A&L WEEK

Termination - 52.212-4

- **Concepts differ from clauses in Part 49**
- **Termination for Cause**
 - Includes all remedies available to any buyer in the marketplace
- **Termination for Convenience**
 - Contractor paid for percentage of work completed, direct charges





12.403

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Let's look at terminations. The paragraphs in 52.212-4 of interest here are (f) excusable delays, (l) termination for the Government's convenience, and (m) termination for cause.

The termination provisions in 52.212-4 are quite different from the standard clauses in Part 49, as they are patterned after those found in industry contracts.

Note in paragraph (f) excusable delays, how much more lenient the language is. For example, it recognizes delays of a common carrier.

Note in (l) termination for the Government's convenience, that the contractor shall be paid a percentage of contract price based on percentage of work done and any direct charges resulting from the termination. This is a very commercial application. There is no government-unique record keeping (CAS or cost principles).

Note in (m) termination for cause (cause is commercial term - Part 49 term is default), the reasons for termination and the remedies available are very broad and are the same as those available to any commercial buyer. Expanded from Part 49 terms.

All of these changes simplify the termination processes and makes the process more commercial, reduces paperwork and provides greater flexibility.

Let's compare 52.212-4(l) with the traditional clause found at 52.249-2.

(12.403) (52.212-4)

A&L WEEK

Implied Warranty

52.212-4(o)

Implied warranties of:

- **Merchantability**
- **Fitness for a particular purpose**

Commercial Practices may exclude implied warranties. If so:

- **Obtain acceptable express warranty**







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One of the greatest benefits of “going commercial” is that these warranties are implied to be part of contracts for the acquisition of commercial items, unless the contractor and Contracting Officer agree that they are not part of the transaction, i.e., to exclude them.

Both of these warranties are extensively covered in the UCC.

Merchantability means that items are reasonably fit for the ordinary purposes for which they’re used. Can be average, fair or medium grade quality. Merchantability does not require item to be perfect.

Fitness for particular purpose means that the item is fit for the particular purpose for which it is used (meaning that the particular purpose is not a common, ordinary purpose). This applies whenever the seller knows the particular purpose for the item and the Government relies upon the seller’s skill and judgment that the item would be appropriate for that particular use.

Warning: In many commercial situations, these warranties are excluded by a seller in the terms of their express warranties. This may be appropriate as long as the express warranties provide for repair or replacement of defective items discovered within a reasonable time after acceptance.

12.404



Express Warranty

(12.404/FASA) Express warranties:

- Take advantage of commercial warranties
- Solicit same warranties provided to public
- May specify minimum terms
- Warranty should: protect needs, be cost effective and allow post-award admin
- Comply with notice period/method



Part 12 language also encourages contracting officers to take advantage of any express warranties offered by the contractor. Contracting Officers should, to the maximum practicable extent, require offerors to propose at least the same warranties and levels of protection as they offer to the general public. In agreeing to any express warranty, make sure that it is adequate to protect the needs of the Government, e.g., covers the items intended, allows for effective post-award administration, e.g. can be implemented, and is cost-effective. (If you have a claim, make it within notice period and method.)

Market research should focus on what types of express warranties are available, especially those that are above and beyond “standard” warranties, and the effect enhanced warranties have on item cost. The lack of standardized terms in the marketplace for different warranty levels underscores the need for specific definitions and a clear understanding of the warranty levels actually procured. Every commercial market tends to have its own customs regarding warranties offered, and sometimes warranties are a key differentiator in the marketplace, especially as the items increase in complexity. It is for this reason that warranty can be a very effective evaluation criteria.

Warning: It is critical to understand what the customer’s actual needs are. Warranties are very complex, and it would be easy to “under-buy” (not acquire enough warranty protection) as well as “over-buy” (buy too much and spend too much).

12.404

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Recent Changes to Part 12 - FACs

- 97-19** Revised 52-212.5 (e) - Removed SCA from list of laws that are inapplicable to Subcontracts for the procurement of commercial items.
- 97- 22** Revised 52-212.4 (b) - Added prohibition against assignment of claims when payment is made by a third party.
- 97- 26** Required that all Agencies use FedBusOpps for public notice of procurement actions over \$25,000 by 1 October 2001.
- 97- 27** Implemented Section 508 of the Rehabilitation Act of 1973.

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Impact of these recent FACs in the Acquisition Workforce:

97-19 and 97-22 are basically administrative changes, and have little or no impact.

97-26 introduces a major change to the acquisition process. It designates FedBusOpps as the single point of public access to Governmentwide procurement opportunities (the "Governmentwide Point of Entry" or "GPE"). Agencies have until October 1, 2001 to complete their transition to, or integration with, FedBusOpps. By that date, all agencies must use FedBusOpps to provide access to public notices of procurement actions over \$25K that are solicitations and amendments. In addition, agencies will not be required to provide notice in the CBD as of January 1, 2002, since access to this data will be provided via the Internet through FedBusOpps.

97-27 has a major impact on generation of requirements documents for electronic and information technology buys. They must comply with the applicable accessibility standards issued by the Architecture and Transportation Barriers Compliance Board.

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Changes Pending to Part 12 - FAR Cases

- 2001- 004** Exemption of Certain Commercial Service Contracts from the SCA.
- 2000- 305** Commercially Available Off-The-Shelf Items (COTS)
- 2000- 303** Acquisition of Commercial Items
- 2000- 013** Contract Types for Commercial Item Acquisitions
- 2000- 012** Update to SF1449
- 2000- 011** Revisions to Provisions/Clauses to Accommodate Sealed Bidding and Simplified Procedures in Commercial Item Acquisitions
- 2000- 010** Acquisition of Construction Under Part 12
- 2000- 009** Update to 52-212.5

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Potential impact of these proposed rules on the Acquisition Workforce:

2001-004 - Would exempt certain contracts for commercial services for coverage under the Service Contract Act (under certain conditions).

2000-305 - Would revise FAR to include a list of provisions that are inapplicable for the procurement of COTS items.

2000-303 - Would implement minor changes to commercial item definition.

2000-013 - Would clarify what types of contracts are authorized for the acquisition of commercial items (e.g., Fixed Price Award Fee).

2000-012 - Would make minor administrative updates to SF1449.

2000-011 - Would revise 52.212-1 to facilitate the use of sealed bidding or requests for quotations for commercial items.

2000-010 - Would revise FAR to provide for acquisition of construction as commercial items. Construction is currently procured IAW Part 36. Allowing contracting officers to procure construction using Part 12 would require a significant paradigm shift for the Corps of Engineers acquisition personnel.

2000-009 - Would make minor administrative updates to 52.212-5.

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Changes Pending to Part 12 - DFARS Cases

- 2001- D011** Treatment of Proprietary Data Concerning Commercial Items
- 2000- D306** Performance-Based Service Contracts Using Part 12 Procedures
- 1995- D712** Acquisition of Commercial Items

Commercial Acquisition

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Potential impact of these proposed rules on the Acquisition Workforce:

2001-D011 - Would make minor revisions concerning the treatment of contractors' proprietary data.

2000-D306 - Would implement a change that authorizes DoD to treat performance-based service contracts/task orders valued at \$5M or less as commercial items if certain conditions are met.

1995-D712 - Would conform DFARS to FAR changes concerning the acquisition of commercial items. Would also implement DoD-unique requirements regarding the acquisition of commercial items.

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Summary

-  **The majority of DoD purchases are commercial items, and should be procured using Part 12 procedures.**
-  **Contracting activities can realize significant benefits by using Part 12 procedures.**
-  **Contractor costs are reduced, and the savings are passed on to the Government.**
-  **Contracting professionals should champion the acquisition of commercial items to their customers.**



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The great majority of supplies and services purchased by the DoD are definitely commercial items. Unfortunately, a significant number of those purchases are accomplished using procedures other than those mandated in Part 12.

The most important impact of using Part 12 is the impact on the federal procurement budget and our national industrial base.

Contracting activities can save tremendous amounts of time, people and money by using Part 12 procedures to purchase commercial items.

Contractor's costs will be reduced whenever their commercial and government lines can be combined.

Money and time should be saved by not having to comply with government-unique terms and conditions such as inspection and quality procedures.

Use of these procedures should open up additional portions of the commercial marketplace to government buys and encourage additional competition.

Contracting professionals should take every opportunity to learn how to use Part 12 procedures, and should also champion the acquisition of commercial items to satisfy the needs of their customers.



Take a look at the last handout. These are a representative sample of Federal Supply Codes. Can anyone find any FSC that is anything other than a commercial item?

The answer is - they are all commercial items.

Does everyone use Part 12 to purchase them?

Unfortunately, across the Services, contracting activities are still using procedures other than Part 12 to procure these categories of supplies and services.

A very few of these are valid - the majority are not - and the cost to Uncle Sam is enormous. And since Sam's money is your money - it's a burden to you too!

Get on the commercial bandwagon - buying commercial saves big bucks for you, your customer, and Uncle Sam!

**COMMERCIAL ITEMS
KEY DEFINITIONS**

**FEDERAL ACQUISITION REGULATION
PART 2-DEFINITIONS OF WORDS AND TERMS**

2.101 Definitions.

Commercial component means any component that is a commercial item.

Commercial item means ----

- a) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that ----
 - (1) Has been sold, leased, or licensed to the general public; or,
 - (2) Has been offered for sale, lease, or license to the general public;
- b) Any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;
- c) Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for----
 - (1) Modifications of a type customarily available in the commercial marketplace; or
 - (2) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. "Minor" modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;
- d) Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition that are of a type customarily combined and sold in combination to the general public;
- e) Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (a), (b), (c), or (d) of this definition, and if the source of such services----
 - (1) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and
 - (2) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;

PART 2-DEFINITIONS OF WORDS AND TERMS (continued)

f) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed;

g) Any item, combination of items, or service referred to in paragraphs (a) through (f), notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

h) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

Component means any item supplied to the Federal Government as part of an end item or of another component except that for use in 52.225-9 and 52.225-11, see the definitions in 52.225-9(a) and 52.225.11(a).

Market research means collecting and analyzing information about capabilities within the market to satisfy agency needs.

Nondevelopmental item means ----

a) Any previously developed item of supply used exclusively for governmental purposes by a Federal agency, a State or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;

b) Any item described in paragraph (a), of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or

c) Any item of supply being produced that does not meet the requirements paragraph (a) or (b) solely because the item is not yet in use.

* * * * *

HANDOUT
COMMERCIAL ITEMS CLAUSES AND PROVISIONS
52.212-1 THROUGH 52.212-5

FAR 52.212-1 Instructions to Offerors--Commercial Items. (10/2000)

As prescribed in 12.301(b)(1), insert the following provision:

INSTRUCTIONS TO OFFERORS--COMMERCIAL ITEMS (OCT 2000)

(a) North American Industry Classification System (NAICS) code and small business size standard. The NAICS code and small business size standard for this acquisition appear in Block 10 of the solicitation cover sheet (SF 1449). However, the small business size standard for a concern which submits an offer in its own name, but which proposes to furnish an item which it did not itself manufacture, is 500 employees.

(b) Submission of offers. Submit signed and dated offers to the office specified in this solicitation at or before the exact time specified in this solicitation. Offers may be submitted on the SF 1449, letterhead stationery, or as otherwise specified in the solicitation. As a minimum, offers must show --

(1) The solicitation number;

(2) The time specified in the solicitation for receipt of offers;

(3) The name, address, and telephone number of the offeror;

(4) A technical description of the items being offered in sufficient detail to evaluate compliance with the requirements in the solicitation. This may include product literature, or other documents, if necessary;

(5) Terms of any express warranty;

(6) Price and any discount terms;

(7) "Remit to" address, if different than mailing address;

(8) A completed copy of the representations and certifications at FAR 52.212-3;

(9) Acknowledgment of Solicitation Amendments;

(10) Past performance information, when included as an evaluation factor, to include recent and relevant contracts for the same or similar items and other references (including contract numbers, points of contact with telephone numbers and other relevant information); and

(11) If the offer is not submitted on the SF 1449, include a statement specifying the extent of agreement with all terms, conditions, and provisions included in the solicitation. Offers that fail to furnish required representations or information, or reject the terms and conditions of the solicitation may be excluded from consideration.

(c) Period for acceptance of offers. The offeror agrees to hold the prices in its offer firm for 30 calendar days from the date specified for receipt of offers, unless another time period is specified in an addendum to the solicitation.

(d) Product samples. When required by the solicitation, product samples shall be submitted at or prior to the time specified for receipt of offers. Unless otherwise specified in this solicitation, these samples shall be submitted at no expense to the Government, and returned at the sender's request and expense, unless they are destroyed during preaward testing.

(e) Multiple offers. Offerors are encouraged to submit multiple offers presenting alternative terms and conditions or commercial items for satisfying the requirements of this solicitation. Each offer submitted will be evaluated separately.

(f) Late submissions, modifications, revisions, and withdrawals of offers. (1) Offerors are responsible for submitting offers, and any modifications, revisions, or withdrawals, so as to reach the Government office designated in the solicitation by the time specified in the solicitation. If no time is specified in the solicitation, the time for receipt is 4:30 p.m., local time, for the designated Government office on the date that offers or revisions are due.

(2)(i) Any offer, modification, revision, or withdrawal of an offer received at the Government office designated in the solicitation after the exact time specified for receipt of offers is "late" and will not be considered unless it is received before award is made, the Contracting Officer determines that accepting the late offer would not unduly delay the acquisition; and--

(A) If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of offers; or

(B) There is acceptable evidence to establish that it was received at the Government installation designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers; or

(C) If this solicitation is a request for proposals, it was the only proposal received.

(ii) However, a late modification of an otherwise successful offer, that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted.

(3) Acceptable evidence to establish the time of receipt at the Government installation includes the time/date stamp of that installation on the offer wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel.

(4) If an emergency or unanticipated event interrupts normal Government processes so that offers cannot be received at the Government office designated for receipt of offers by the exact time specified in the solicitation, and urgent Government requirements preclude amendment of the solicitation or other notice of an extension of the closing date, the time specified for receipt of offers will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal Government processes resume.

(5) Offers may be withdrawn by written notice received at any time before the exact time set for receipt of offers. Oral offers in response to oral solicitations may be withdrawn orally. If the solicitation authorizes facsimile offers, offers may be withdrawn via facsimile received at any time before the exact time set for receipt of offers, subject to the conditions specified in the solicitation concerning facsimile offers.

(i) Automatic distribution may be obtained on a subscription basis.

(ii) Order forms, pricing information, and customer support information may be obtained--

(A) By telephone at (215) 697-2667/2179; or

(B) Through the DoDSSP Internet site at <http://assist.daps.mil>.

(3) Nongovernment (voluntary) standards must be obtained from the organization responsible for their preparation, publication, or maintenance.

(j) Data Universal Numbering System (DUNS) Number. (Applies to offers exceeding \$25,000.) The offeror shall enter, in the block with its name and address on the cover page of its offer, the annotation "DUNS" followed by the DUNS number that identifies the offeror's name and address. If the offeror does not have a DUNS number, it should contact Dun and Bradstreet to obtain one at no charge. An offeror within the United States may call 1-800-333-0505. The offeror may obtain more information regarding the DUNS number, including locations of local Dun and Bradstreet Information Services offices for offerors located outside the United States, from the Internet home page at <http://www.customerservice@dnb.com>. If an offeror is unable to locate a local service center, it may send an e-mail to Dun and Bradstreet at globalinfo@mail.dnb.com.

(End of provision)

FAR 52.212-2 Evaluation--Commercial Items. (1/99)

As prescribed in 12.301(c), the Contracting Officer may insert a provision substantially as follows:

EVALUATION-- COMMERCIAL ITEMS (JAN 1999)

(a) The Government will award a contract resulting from this solicitation to the responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. The following factors shall be used to evaluate offers:

[Contracting Officer shall insert the significant evaluation factors, such as (i) technical capability of the item offered to meet the Government requirement; (ii) price; (iii) past performance (see FAR 15.304); (iv) small disadvantaged business participation; and include them in the relative order of importance of the evaluation factors, such as in descending order of importance.]

Technical and past performance, when combined, are ____ [Contracting Officer state, in accordance with FAR 15.304, the relative importance of all other evaluation factors, when combined, when compared to price.]

(b) Options. The Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. The Government may determine that an offer is unacceptable if the option prices are significantly unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

(c) A written notice of award or acceptance of an offer, mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer, shall result in a binding contract without further action by either party. Before the offer's specified expiration time, the Government may accept an offer (or part of an offer), whether or not there are negotiations after its receipt, unless a written notice of withdrawal is received before award.

(End of Provision)

FAR 52.212-3 Offeror Representations and Certifications--Commercial Items. (4/2001)

As prescribed in 12.301(b)(2), insert the following provision:

OFFEROR REPRESENTATIONS AND CERTIFICATIONS--COMMERCIAL ITEMS (APR 2001)

(a) Definitions. As used in this provision:

"Emerging small business" means a small business concern whose size is no greater than 50 percent of the numerical size standard for the NAICS code designated.

Forced or indentured child labor means all work or service--

(1) Exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or

(2) Performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.

Service-disabled veteran-owned small business concern--

(1) Means a small business concern--

(i) Not less than 51 percent of which is owned by one or more service--disabled veterans or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more service-disabled veterans; and

(ii) The management and daily business operations of which are controlled by one or more service-disabled veterans or, in the case of a veteran with permanent and severe disability, the spouse or permanent caregiver of such veteran.

(2) Service-disabled veteran means a veteran, as defined in 38 U.S.C. 101(2), with a disability that is service-connected, as defined in 38 U.S.C. 101(16).

"Small business concern" means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria in 13 CFR Part 121 and size standards in this solicitation.

Veteran-owned small business concern means a small business concern--

(1) Not less than 51 percent of which is owned by one or more veterans (as defined at 38 U.S.C. 101(2)) or, in the case of any publicly owned business, not less than 51 percent of the stock of which is owned by one or more veterans; and

(2) The management and daily business operations of which are controlled by one or more veterans.

"Women-owned small business concern" means a small business concern--

(1) Which is at least 51 percent owned by one or more women; or in the case of any publicly owned business, at least 51 percent of its stock is owned by one or more women; and

(2) Whose management and daily business operations are controlled by one or more women.

"Women-owned business concern" means a concern which is at least 51 percent owned by one or more women; or in the case of any publicly owned business, at least 51 percent of its stock is owned by one or more women; and whose management and daily business operations are controlled by one or more women.

(b) Taxpayer Identification Number (TIN) (26 U.S.C. 6109, 31 U.S.C. 7701). (Not applicable if the offeror is required to provide this information to a central contractor registration database to be eligible for award.)

(1) All offerors must submit the information required in paragraphs (b)(3) through (b)(5) of this provision to comply with debt collection requirements of 31 U.S.C. 7701(c) and 3325(d), reporting requirements of 26 U.S.C. 6041, 6041A, and 6050M, and implementing regulations issued by the Internal Revenue Service (IRS).

(2) The TIN may be used by the Government to collect and report on any delinquent amounts arising out of the offeror's relationship with the Government (31 U.S.C. 7701(c)(3)). If the resulting contract is subject to the payment reporting requirements described in FAR 4.904, the TIN provided hereunder may be matched with IRS records to verify the accuracy of the offeror's TIN.

(3) Taxpayer Identification Number (TIN).

TIN:

TIN has been applied for.

TIN is not required because:

Offeror is a nonresident alien, foreign corporation, or foreign partnership that does not have income effectively connected with the conduct of a trade or business in the United States and does not have an office or place of business or a fiscal paying agent in the United States;

Offeror is an agency or instrumentality of a foreign government;

Offeror is an agency or instrumentality of the Federal Government.

(4) Type of organization.

Sole proprietorship;

Partnership;

Corporate entity (not tax-exempt);

Corporate entity (tax-exempt);

Government entity (Federal, State, or local);

Foreign government;

International organization per 26 CFR 1.6049-4;

Other

(5) Common parent.

Offeror is not owned or controlled by a common parent;

Name and TIN of common parent:

Name

TIN

(c) Offerors must complete the following representations when the resulting contract is to be performed inside the United States, its territories or possessions, Puerto Rico, the Trust Territory of the Pacific Islands, or the District of Columbia. Check all that apply.

(1) Small business concern. The offeror represents as part of its offer that it is, is not a small business concern.

(2) Veteran-owned small business concern. [Complete only if the offeror represented itself as a small business concern in paragraph (c)(1) of this provision.] The offeror represents as part of its offer that it is, is not a veteran-owned small business concern.

(3) Service-disabled veteran-owned small business concern. [Complete only if the offeror represented itself as a veteran-owned small business concern in paragraph (c)(2) of this provision.] The offeror represents as part of its offer that it is, is not a service-disabled veteran-owned small business concern.

(4) Small disadvantaged business concern. [Complete only if the offeror represented itself as a small business concern in paragraph (c)(1) of this provision.] The offeror represents, for general statistical purposes, that it is is not a small disadvantaged business concern as defined in 13 CFR 124.1002.

(5) Women-owned small business concern. [Complete only if the offeror represented itself as a small business concern in paragraph (c)(1) of this provision.] The offeror represents that it is, is not a women-owned small business concern.

Note: Complete paragraphs (c)(6) and (c)(7) only if this solicitation is expected to exceed the simplified acquisition threshold.

(6) Women-owned business concern (other than small business concern). [Complete only if the offeror is a women-owned business concern and did not represent itself as a small business concern in paragraph (c)(1) of this provision.] The offeror represents that it is, is not a women-owned business concern.

(7) Tie bid priority for labor surplus area concerns. If this is an invitation for bid, small business offerors may identify the labor surplus areas in which costs to be incurred on account of manufacturing or production (by offeror or first-tier subcontractors) amount to more than 50 percent of the contract price: _____

(8) Small Business Size for the Small Business Competitiveness Demonstration Program and for the Targeted Industry Categories under the Small Business Competitiveness Demonstration Program. [Complete only if the offeror has represented itself to be a small business concern under the size standards for this solicitation.]

(i) (Complete only for solicitations indicated in an addendum as being set-aside for emerging small businesses in one of the four designated industry groups (DIGs).) The offeror represents as part of its offer that it is, is not an emerging small business.

(ii) (Complete only for solicitations indicated in an addendum as being for one of the targeted industry categories (TICs) or four designated industry groups (DIGs).) Offeror represents as follows:

(A) Offeror's number of employees for the past 12 months (check the Employees column if size standard stated in the solicitation is expressed in terms of number of employees); or

(B) Offeror's average annual gross revenue for the last 3 fiscal years (check the Average Annual Gross Number of Revenues column if size standard stated in the solicitation is expressed in terms of annual receipts)

(Check one of the following):

Number of Employees Average Annual Gross Revenues

- 50 or fewer ---- \$1 million or less
- 51--100 ---- \$1,000,001--\$2 million
- 101--250 ---- \$2,000,001--\$3.5 million
- 251--500 ---- \$3,500,001--\$5 million
- 501--750 ---- \$5,000,001--\$10 million
- 751--1,000 ---- \$10,000,001--\$17 million
- Over 1,000 ---- Over \$17 million

(9) (Complete only if the solicitation contains the clause at [FAR 52.219-23](#), Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns, or [FAR 52.219-25](#), Small Disadvantaged Business Participation Program--Disadvantaged Status and Reporting, and the offeror desires a benefit based on its disadvantaged status.)

(i) General. The offeror represents that either--

(A) It is, is not certified by the Small Business Administration as a small disadvantaged business concern and identified, on the date of this representation, as a certified small disadvantaged business concern in the database maintained by the Small Business Administration (PRO-Net), and that no material change in disadvantaged ownership and control has occurred since its certification, and, where the concern is owned by one or more individuals claiming disadvantaged status, the net worth of each individual upon whom the certification is based does not exceed \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); or

(B) It has, has not submitted a completed application to the Small Business Administration or a Private Certifier to be certified as a small disadvantaged business concern in accordance with 13 CFR 124, Subpart B, and a decision on that application is pending, and that no material change in disadvantaged ownership and control has occurred since its application was submitted.

(ii) Joint Ventures under the Price Evaluation Adjustment for Small Disadvantaged Business Concerns. The offeror represents, as part of its offer, to enter the name of the small disadvantaged business concern that is participating in the joint venture: _____

(d) Representations required to implement provisions of Executive Order 11246--

(1) Previous contracts and compliance. The offeror represents that--

(i) It has, has not participated in a previous contract or subcontract subject to the Equal Opportunity clause of this solicitation; and

(ii) It has, has not filed all required compliance reports.

(2) Affirmative Action Compliance. The offeror represents that--

(i) It [] has developed and has on file, [] has not developed and does not have on file, at each establishment, affirmative action programs required by rules and regulations of the Secretary of Labor (41 CFR parts 60-1 and 60-2, or

(ii) It [] has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor.

(e) Certification Regarding Payments to Influence Federal Transactions (31 U.S.C. 1352). (Applies only if the contract is expected to exceed \$100,000.) By submission of its offer, the offeror certifies to the best of its knowledge and belief that no Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress or an employee of a Member of Congress on his or her behalf in connection with the award of any resultant contract.

(f) Buy American Act--Balance of Payments Program Certificate. (Applies only if the clause at Federal Acquisition Regulation (FAR) 52.225-1, Buy American Act--Balance of Payments Program--Supplies, is included in this solicitation.)

(1) The offeror certifies that each end product, except those listed in paragraph (f)(2) of this provision, is a domestic end product as defined in the clause of this solicitation entitled "Buy American Act--Balance of Payments Program--Supplies" and that the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

(2) Foreign End Products:

Line item No. Country of origin

(List as necessary)

(3) The Government will evaluate offers in accordance with the policies and procedures of FAR Part 25.

(g)(1) Buy American Act--North American Free Trade Agreement--Israeli Trade Act--Balance of Payments Program Certificate. (Applies only if the clause at FAR 52.225-3, Buy American Act--North American Free Trade Agreement--Israeli Trade Act--Balance of Payments Program, is included in this solicitation.)

(i) The offeror certifies that each end product, except those listed in paragraph (g)(1)(ii) or (g)(1)(iii) of this provision, is a domestic end product as defined in the clause of this solicitation entitled "Buy American Act--North American Free Trade Agreement--Israeli Trade Act--Balance of Payments Program" and that the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States.

(ii) The offeror certifies that the following supplies are NAFTA country end products or Israeli end products as defined in the clause of this solicitation entitled "Buy American Act--North American Free Trade Agreement--Israeli Trade Act--Balance of Payments Program":

NAFTA Country or Israeli End Products

Line item No. Country of origin

(List as necessary)

(iii) The offeror shall list those supplies that are foreign end products (other than those listed in paragraph (g)(1)(ii) of this provision) as defined in the clause of this solicitation entitled "Buy American Act--North American Free Trade Agreement--Israeli Trade Act--Balance of Payments Program." The offeror shall list as other foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

Other Foreign End Products

Line item No. Country of origin

(List as necessary)

(iv) The Government will evaluate offers in accordance with the policies and procedures of FAR Part 25.

(2) Buy American Act--North American Free Trade Agreements--Israeli Trade Act--Balance of Payments Program Certificate, Alternate I (Feb 2000). If Alternate I to the clause at FAR 52.225-3 is included in this solicitation, substitute the following paragraph (g)(1)(ii) for paragraph (g)(1)(ii) of the basic provision:

(g)(1)(ii) The offeror certifies that the following supplies are Canadian end products as defined in the clause of this solicitation entitled "Buy American Act--North American Free Trade Agreement--

Israeli Trade Act--Balance of Payments Program":

Canadian End Products

Line Item No.: _____

(List as necessary)

(3) Buy American Act--North American Free Trade Agreements--Israeli Trade Act--Balance of Payments Program Certificate, Alternate II (Feb 2000). If Alternate II to the clause at FAR 52.225-3 is included in this solicitation, substitute the following paragraph (g)(1)(ii) for paragraph (g)(1)(ii) of the basic provision:

(g)(1)(ii) The offeror certifies that the following supplies are Canadian end products or Israeli end products as defined in the clause of this solicitation entitled "Buy American Act--North American Free Trade Agreement--Israeli Trade Act--Balance of Payments Program":

Canadian or Israeli End Products

Line Item No.: _____

Country of Origin: _____

(List as necessary)

(4) Trade Agreements Certificate. (Applies only if the clause at FAR 52.225-5, Trade Agreements, is included in this solicitation.)

(i) The offeror certifies that each end product, except those listed in paragraph (g)(4)(ii) of this provision, is a U.S.-made, designated country, Caribbean Basin country, or NAFTA country end product, as defined in the clause of this solicitation entitled "Trade Agreements."

(ii) The offeror shall list as other end products those end products that are not U.S.-made, designated country, Caribbean Basin country, or NAFTA country end products.

Other End Products

Line Item No.: _____

Country of Origin: _____

(List as necessary)

(iii) The Government will evaluate offers in accordance with the policies and procedures of FAR Part 25. For line items subject to the Trade Agreements Act, the Government will evaluate offers of U.S.-made, designated country, Caribbean Basin country, or NAFTA country end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program. The Government will consider for award only offers of U.S.-made, designated country, Caribbean Basin country, or NAFTA country end products unless the Contracting Officer determines that there are no offers for such products or that the offers for such products are insufficient to fulfill the requirements of the solicitation.

(h) Certification Regarding Debarment, Suspension or Ineligibility for Award (Executive Order 12549). (Applies only if the contract value is expected to exceed the simplified acquisition threshold.) The offeror certifies, to the best of its knowledge and belief, that--

(1) The offeror and/or any of its principals [] are, [] are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency;

(2) [] Have, [] have not, within the three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a Federal, state or local government contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property;

(3) [] Are, [] are not presently indicted for, or otherwise criminally or civilly charged by a government entity with, commission of any of these offenses; and

(4)(i) The offeror, aside from the offenses enumerated in paragraphs (1), (2), and (3) of this paragraph (h), [] has [] has not within the past three years, relative to tax, labor and employment, environmental, antitrust, or consumer protection laws-

(A) Been convicted of a Federal or state felony (or has any Federal or state felony indictments currently pending against them); or

(B) Had a Federal court judgment in a civil case brought by the United States rendered against them; or

(C) Had an adverse decision by a Federal administrative law judge, board, or commission indicating a willful violation of law.

(ii) If the offeror has responded affirmatively, the offeror shall provide additional information if requested by the Contracting Officer.

(i) Certification Regarding Debarment, Suspension or Ineligibility for Award (Executive Order 12549). The offeror certifies, to the best of its knowledge and belief, that--

(1) The offeror and/or any of its principals [] are, [] are not presently debarred, suspended, proposed for debarment, or declared ineligible for the award of contracts by any Federal agency; and

(2) [] Have, [] have not, within a three-year period preceding this offer, been convicted of or had a civil judgment rendered against them for: commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a Federal, state or local government contract or subcontract; violation of Federal or state antitrust statutes relating to the submission of offers; or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property; and [] are, [] are not presently indicted for, or otherwise criminally or civilly charged by a Government entity with, commission of any of these offenses.

(j) Certification Regarding Knowledge of Child Labor for Listed End Products (Executive Order 13126). [The Contracting Officer must list in paragraph (i)(1) any end products being acquired under this solicitation that are included in the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor, unless excluded at 22.1503(b).]

(1) Listed end products.

Listed End Product

Listed Countries of Origin

(2) Certification. [If the Contracting Officer has identified end products and countries of origin in paragraph (i)(1) of this provision, then the offeror must certify to either (i)(2)(i) or (i)(2)(ii) by checking the appropriate block.]

(i) The offeror will not supply any end product listed in paragraph (i)(1) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product.

(ii) The offeror may supply an end product listed in paragraph (i)(1) of this provision that was mined, produced, or manufactured in the corresponding country as listed for that product. The offeror certifies that it has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any such end product furnished under this contract. On the basis of those efforts, the offeror certifies that it is not aware of any such use of child labor.

(End of provision)

Alternate I (Oct 2000). As prescribed in 12.301(b)(2), add the following paragraph (c)(10) to the basic provision:

(10) (Complete if the offeror has represented itself as disadvantaged in paragraph (c)(2) or (c)(9) of this provision.) [The offeror shall check the category in which its ownership falls]:

_____ Black American.

_____ Hispanic American.

_____ Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians).

_____ Asian-Pacific American (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru).

_____ Subcontinent Asian (Asian-Indian) American (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands, or Nepal).

_____ Individual/concern, other than one of the preceding.

Alternate II (Oct 2000). As prescribed in 12.301(b)(2), add the following paragraph (c)(9)(iii) to the basic provision:

(iii) Address. The offeror represents that its address [] is, [] is not in a region for which a small disadvantaged business procurement mechanism is authorized and its address has not changed since its certification as a small disadvantaged business concern or submission of its application for certification. The list of authorized small disadvantaged business procurement mechanisms and regions is posted at <http://www.arnet.gov/References/sdbadjustments.htm>. The offeror shall use the list in effect on the date of this solicitation. "Address," as used in this provision, means the address of the offeror as listed on the Small Business Administration's register of small disadvantaged business concerns or the address on the completed application that the concern has submitted to the Small Business Administration or a Private Certifier in accordance with 13 CFR part 124, subpart B. For joint ventures, "address" refers to the address of the small disadvantaged business concern that is participating in the joint venture.

Alternate III (Oct 2000). As prescribed in 12.301(b)(2), add the following paragraph (c)(11) to the basic provision:

(11) HUBZone small business concern. [Complete only if the offeror represented itself as a small business concern in paragraph (c)(1) of this provision.] The offeror represents as part of its offer that--

(i) It [] is, [] is not a HUBZone small business concern listed, on the date of this representation, on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration, and no material change in ownership and control, principal place of ownership, or HUBZone employee percentage has occurred since it was certified by the Small Business Administration in accordance with 13 CFR part 126; and

(ii) It [] is, [] is not a joint venture that complies with the requirements of 13 CFR part 126, and the representation in paragraph (c)(11)(i) of this provision is accurate for the HUBZone small business concern or concerns that are participating in the joint venture. [The offeror shall enter the name or names of the HUBZone small business concern or concerns that are participating in the joint venture: _____.] Each HUBZone small business concern participating in the joint venture shall submit a separate signed copy of the HUBZone representation.

(End of Provision)

FAR 52.212-4 Contract Terms and Conditions--Commercial Items. (3/2001)

As prescribed in 12.301(b)(3), insert the following clause:

CONTRACT TERMS AND CONDITIONS--COMMERCIAL ITEMS (MAR 2001)

(a) Inspection/Acceptance. The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its postacceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(b) Assignment. The Contractor or its assignee may assign its rights to receive payment due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727). However, when a third party makes payment (e.g., use of the Governmentwide commercial purchase card), the Contractor may not assign its rights to receive payment under this contract.

(c) Changes. Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(d) Disputes. This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated herein by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract.

(e) Definitions. The clause at FAR 52.202-1, Definitions, is incorporated herein by reference.

(f) Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

(g) Invoice. The Contractor shall submit an original invoice and three copies (or electronic invoice, if authorized,) to the address designated in the contract to receive invoices. An invoice must include--

- (1) Name and address of the Contractor;
- (2) Invoice date;
- (3) Contract number, contract line item number and, if applicable, the order number;
- (4) Description, quantity, unit of measure, unit price and extended price of the items delivered;
- (5) Shipping number and date of shipment including the bill of lading number and weight of shipment if shipped on Government bill of lading;
- (6) Terms of any prompt payment discount offered;
- (7) Name and address of official to whom payment is to be sent; and
- (8) Name, title, and phone number of person to be notified in event of defective invoice.

Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. Contractors are encouraged to assign an identification number to each invoice.

(h) Patent indemnity. The Contractor shall indemnify the Government and its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(i) Payment. Payment shall be made for items accepted by the Government that have been delivered to the delivery destinations set forth in this contract. The Government will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) Circular A-125, Prompt Payment. If the Government makes payment by Electronic Funds Transfer (EFT), see 52.212-5(b) for the appropriate EFT clause.

In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(j) Risk of loss. Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

- (1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or
- (2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

(k) Taxes. The contract price includes all applicable Federal, State, and local taxes and duties.

(l) Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(m) Termination for cause. The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon request, with adequate assurances of future performance. In the event of termination for cause, the Government shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(n) Title. Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to the Government upon acceptance, regardless of when or where the Government takes physical possession.

(o) Warranty. The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract.

(p) Limitation of liability. Except as otherwise provided by an express or implied warranty, the Contractor will not be liable to the Government for consequential damages resulting from any defect or deficiencies in accepted items.

(q) Other compliances. The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.

(r) Compliance with laws unique to Government contracts. The Contractor agrees to comply with 31 U.S.C. 1352 relating to limitations on the use of appropriated funds to influence certain Federal contracts; 18 U.S.C. 431 relating to officials not to benefit; 40 U.S.C. 327, et seq., Contract Work Hours and Safety Standards Act; 41 U.S.C. 51-58, Anti-Kickback Act of 1986; 41 U.S.C. 265 and 10 U.S.C. 2409 relating to whistleblower protections; 49 U.S.C. 40118, Fly American; and 41 U.S.C. 423 relating to procurement integrity.

(s) Order of precedence. Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order: (1) the schedule of supplies/services; (2) the Assignments, Disputes, Payments, Invoice, Other Compliances, and Compliance with Laws Unique to Government Contracts paragraphs of this clause; (3) the clause at 52.212-5; (4) addenda to this solicitation or contract, including any license agreements for computer software; (5) solicitation provisions if this is a solicitation; (6) other paragraphs of this clause; (7) the Standard Form 1449; (8) other documents, exhibits, and attachments; and (9) the specification.

(End of clause)

FAR 52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items. (1/2001)

As prescribed in 12.301(b)(4), insert the following clause:

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS--COMMERCIAL ITEMS (FEB 2001)

(a) The Contractor shall comply with the following FAR clauses, which are incorporated in this contract by reference, to implement provisions of law or executive orders applicable to acquisitions of commercial items:

(1) 52.222-3, Convict Labor (E.O. 11755).

(2) 52.233-3, Protest after Award (31 U.S.C. 3553).

(b) The Contractor shall comply with the FAR clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of commercial items or components:

[Contracting Officer shall check as appropriate.]

_____ (1) 52.203-6, Restrictions on Subcontractor Sales to the Government, with Alternate I (41 U.S.C. 253g and 10 U.S.C. 2402).

_____ (2) 52.219-3, Notice of HUBZone Small Business Set-Aside (Jan 1999).

_____ (3) 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (Jan 1999) (if the offeror elects to waive the preference, it shall so indicate in its offer).

_____ (4)(i) 52.219-5, Very Small Business Set-Aside (Pub. L. 103-403, section 304, Small Business Reauthorization and Amendments Act of 1994).

_____ (ii) Alternate I to 52.219-5.

- _____ (iii) Alternate II to 52.219-5.
- _____ (5) 52.219-8, Utilization of Small Business Concerns (15 U.S.C. 637 (d)(2) and (3)).
- _____ (6) 52.219-9, Small Business Subcontracting Plan (15 U.S.C. 637(d)(4)).
- _____ (7) 52.219-14, Limitations on Subcontracting (15 U.S.C. 637(a)(14)).
- _____ (8)(i) 52.219-23, Notice of Price Evaluation

Adjustment for Small Disadvantaged Business Concerns (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323) (if the offeror elects to waive the adjustment, it shall so indicate in its offer).

- _____ (ii) Alternate I of 52.219-23.
- _____ (9) 52.219-25, Small Disadvantaged Business Participation Program--Disadvantaged Status and Reporting (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).
- _____ (10) 52.219-26, Small Disadvantaged Business Participation Program--Incentive Subcontracting (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).
- _____ (11) 52.222-21, Prohibition of Segregated Facilities (Feb 1999).
- _____ (12) 52.222-26, Equal Opportunity (E.O. 11246).
- _____ (13) 52.222-35, Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 4212).
- _____ (14) 52.222-36, Affirmative Action for Handicapped Workers (29 U.S.C. 793).
- _____ (15) 52.222-37, Employment Reports on Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 4212).
- _____ (16) 52.222-19, Child Labor--Cooperation with Authorities and Remedies (E.O. 13126).
- _____ (17)(i) 52.223-9, Estimate of Percentage of Recovered Material Content for EPA -Designated Products (42 U.S.C. 6962(c)(3)(A)(ii)).
- _____ (ii) Alternate I of 52.223-9 (42 U.S.C. 6962(i)(2)(C)).
- _____ (18) 52.225-1, Buy American Act--Balance of Payments Program--Supplies (41 U.S.C. 10a-10d).
- _____ (19)(i) 52.225-3, Buy American Act--North American Free Trade Agreement--Israeli Trade Act--Balance of Payments Program (41 U.S.C. 10a-10d, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note).
- _____ (ii) Alternate I of 52.225-3.
- _____ (iii) Alternate II of 52.225-3.
- _____ (20) 52.225-5, Trade Agreements (19 U.S.C. 2501, et seq., 19 U.S.C. 3301 note).
- _____ (21) 52.225-13, Restriction on Certain Foreign Purchases (E.O. 12722, 12724, 13059, 13067, 13121, and 13129).
- _____ (22) 52.225-15, Sanctioned European Union Country End Products (E.O. 12849).
- _____ (23) 52.225-16, Sanctioned European Union Country Services (E.O. 12849).
- _____ (24) 52.232-33, Payment by Electronic Funds Transfer--Central Contractor Registration (31 U.S.C. 3332).
- _____ (25) 52.232-34, Payment by Electronic Funds Transfer--Other than Central Contractor Registration (31 U.S.C. 3332).
- _____ (26) 52.232-36, Payment by Third Party (31 U.S.C. 3332).
- _____ (27) 52.239-1, Privacy or Security Safeguards (5 U.S.C. 552a).
- _____ (28) (i) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. 1241).
- _____ (ii) Alternate I of 52.247-64.

(c) The Contractor shall comply with the FAR clauses in this paragraph (c), applicable to commercial services, which the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or executive orders applicable to acquisitions of commercial items or components:

[Contracting Officer check as appropriate.]

_____ (1) 52.222-41, Service Contract Act of 1965, As Amended (41 U.S.C. 351, et seq.).

_____ (2) 52.222-42, Statement of Equivalent Rates for Federal Hires (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).

_____ (3) 52.222-43, Fair Labor Standards Act and Service Contract Act--Price Adjustment (Multiple Year and Option Contracts) (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).

_____ (4) 52.222-44, Fair Labor Standards Act and Service Contract Act--Price Adjustment (29 U.S.C. 206 and 41 U.S.C. 351, et seq.).

_____ (5) 52.222-47, SCA Minimum Wages and Fringe Benefits Applicable to Successor Contract Pursuant to Predecessor Contractor Collective Bargaining Agreement (CBA) (41 U.S.C. 351, et seq.).

_____ (6) 52.222-50, Nondisplacement of Qualified Workers (Executive Order 12933).

(d) Comptroller General Examination of Record. The Contractor shall comply with the provisions of this paragraph (d) if this contract was awarded using other than sealed bid, is in excess of the simplified acquisition threshold, and does not contain the clause at 52.215-2, Audit and Records--Negotiation.

(1) The Comptroller General of the United States, or an authorized representative of the Comptroller General, shall have access to and right to examine any of the Contractor's directly pertinent records involving transactions related to this contract.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in FAR Subpart 4.7, Contractor Records Retention, of the other clauses of this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require the Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) Notwithstanding the requirements of the clauses in paragraphs (a), (b), (c) or (d) of this clause, the Contractor is not required to include any FAR clause, other than those listed below (and as may be required by an addenda to this paragraph to establish the reasonableness of prices under Part 15), in a subcontract for commercial items or commercial components--

(1) 52.222-26, Equal Opportunity (E.O. 11246);

(2) 52.222-35, Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era (38 U.S.C. 4212);

(3) 52.222-36, Affirmative Action for Workers with Disabilities (29 U.S.C. 793);

(4) 52.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. 1241) (flow down not required for subcontracts awarded beginning May 1, 1996); and

(5) 52.222-41, Service Contract Act of 1965, As Amended (41 U.S.C. 351, et seq.).

(End of clause)

Alternate I (Feb 2000). As prescribed in 12.301(b)(4), delete paragraph (d) from the basic clause, redesignate paragraph (e) as paragraph (d), and revise the reference to "paragraphs (a), (b), (c), or (d) of this clause" in the redesignated paragraph (d) to read "paragraphs (a), (b), and (c) of this clause".

(End of clause)

Suggested Broad Classes of Commercial Items

2840 Gas Turbines and Jet Engines, Acft & Comps
3920 Mat Handling Equip, Nonself-propelled
3930 Warehouse Trks & Tractors, Self-propelled
3940 Blocks Tackle Rigging and Slings
4110 Refrigeration Equip
4120 Air Conditioning Equip
5805 Telephone and Telegraph Equipment
6115 Generators and Generator Sets, Electrical
7030 ADP Software
7035 ADP Support Equip
J058 Maint & Repair of Eq/Communication Equipment
J059 Maint & Repair of Eq/Electrical & Elct Equip Comps
J065 Maint & Repair of Eq/Medical & Dental Equipment
J066 Maint & Repair of Eq/Instruments & Lab Equipment
J069 Maint & Repair of Eq/Training Aids & Devices
J070 Maint & Repair of Eq/ADP Equip & Supplies
J073 Maint & Repair of Eq/Food Prep & Serving Equip
J074 Maint & Repair of Eq/Office Machines
Q201 General Health Care Services
Q301 Laboratory Testing Services
Q401 Nursing Services
Q501 Anesthesiology Services
Q502 Cardio-Vascular Services
Q503 Dentistry Services
Q504 Dermatology Services
R706 Logistics Support Services
R707 Contract, Procurement & Acquisition Support Svcs
R708 Public Relations Services
S113 Telephone and/or Communications Services
S114 Water Services
S119 Other Utilities
S201 Custodial - Janitorial Services
S202 Fire Protection Services
S203 Food Services
S204 Fueling & Other Petroleum Svcs-Excluding Storage
S205 Trash/Garbage Collection Svcs-Incl Port San Svcs
S206 Guard Services
S207 Insect & Rodent Control Services
S208 Landscaping/Groundskeeping Services
S218 Snow Removal/Salt Services
S222 Waste Treatment & Storage
U009 Education Services